INDEX TO JOINT APPENDIX

	Pages
Complaint of Robert D. Elder (Civil Action No. 2336-47)	2
Plaintiff's Exhibit "A": Notice to Employee of Reduction in Force	8
Plaintiff's Exhibit "C": Letter, Robert D. Elder to W. Carroll Hunter	10
Amended Complaint of Robert D. Elder	13
Plaintiff's Exhibit "D": Notice from Solicitor to Attorneys re Status of Positions under New Civil Service Rules	28
Plaintiff's Exhibit "E": Memorandum No. 1131.	31
Defendant's Motion for Summary Judgment	32
Affidavit of Lawson A. Moyer	33
Letter of July 14, 1947, John A. Overholt to Robert D. Elder	34
Affidavit of W. Edward Bawcombe	35
Various papers re Robert D. Elder from Solicitor's Office	41-46
Affidavit of Robert D. Elder in opposition to Defendant's Motion for Summary Judgment	47
Order Granting Robert D. Elder Leave to File Amended and Supplemental Complaint	49
Amended and Supplemental Complaint of Robert Elder	49
Plaintiff's Exhibit "F": Letter of June 30, 1947, W. Carroll Hunter to Robert D. Elder	59
Plaintiff's Exhibit "G": Letter of July 24, 1947, W. Carroll Hunter to Robert D. Elder	59
Plaintiff's Exhibit "H": Letter of July 30, 1947, W. Carroll Hunter to Robert D. Elder	60
Plaintiff's Exhibit "I": Personnel Notification of July 25, 1947	61
Plaintiff's Exhibit "J": Letter of July 14, 1947, John A. Overholt to Robert D. Elder	62

	Pages
Plaintiff's Exhibit "K": Letter of October 23, 1947, John F. Edwards to Robert D. Elder	63
Plaintiff's Exhibit "L": Letter of November 26, 1942, Ralph F. Fuchs to Robert D. Elder	64
Plaintiff's Exhibit "M": Letter of February 11, 1943, Ralph F. Fuchs to Robert D. Elder	65
Defendant's Motion to Strike Matter from Pleading and for Summary Judgment	66
Affidavit of W. Edward Bawcombe	69
Informal Memorandum of F. Dickinson Letts, Justice, sustaining defendant's Motion for Summary Judgment	72
Order for Substitution of Party Defendant	73
Motion for Rehearing	73
Order denying Motion for Rehearing	74
Order granting Defendant's Motion for Summary Judgment	74
Notice of Appeal of Robert D. Elder	75
Complaint of Greene Chandler Furman (Civil Action No. 2335-47)	76
Notice of Appeal of Greene Chandler Furman	83
Designation of Consolidated Record on Appeal and Stipulation	83
Proceedings in U. S. C. A., District of Columbia Circuit	87
Minute entry of argument and submission	87
Opinion, Miller, J	88
Judgment	96
Petition for rehearing	97
Order denying petition for rehearing, etc	100
Designation of record	100
Clerk's certificate	101
Stipulation as to record	102
Appellants' petition for modification of opinion and judgment	103
Supplemental designation of record	116
Clerk's certificate [omitted in printing]	117
Orders allowing certiorari	118

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10007

ROBERT D. ELDER, *Appellant*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

No. 10008

GREENE CHANDLER FURMAN, *Appellant*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

Appeals from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

Filed June 5 1947

In the District Court of the United States
for the District of Columbia.

Civil Action No. 2336

ROBERT D. ELDER, 4233 32nd Road South, Arlington, Virginia, *Plaintiff*

v.

CLINTON P. ANDERSON, Secretary of Agriculture, Washington, D. C., *Defendant*

Suit for a Temporary and Permanent Injunction to Restrain the Defendant from Separating the Plaintiff, an Honorably Discharged Veteran of the United States, from a Position as Attorney under the Jurisdiction of the Defendant, for a Declaratory Judgment, and For Such Other Relief as May Be Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

1. That the plaintiff is a citizen of the United States, and resides at 4233 32nd Road South, Arlington, Virginia, and that his permanent domicile is in the City of Leadville, State of Colorado.

2. That the defendant is the duly appointed, acting and qualified Secretary of the United States Department of Agriculture, and in such capacity is charged by law with the administration of all laws enacted by the Congress of the United States relating to the United States Department of Agriculture, and is specifically charged by law with the employment of personnel under the jurisdiction of the United States Department of Agriculture.

3. That employees of the United States Department of Agriculture are required to be qualified in their various employment positions according to provisions of the Civil Service Act and the rules and regulations of the United

States Civil Service Commission, and are in a classification which is generally known as the classified and unclassified civil service of the United States. That the defend-
2 ant is required under the laws of the United States to fill any and all positions in the United States Department of Agriculture falling within the classified and unclassified civil service from persons who have been found to be duly qualified for such positions by the United States Civil Service Commission.

4. That the plaintiff enlisted in the military service of the United States in August, 1917, served in the infantry branch of the armed forces for over one year thereafter, and was separated therefrom under honorable conditions pursuant to an honorable discharge December 9, 1918 as Captain, Infantry, United States Army.

5. That the plaintiff took the written Federal Civil Service Legal Examination given by the United States Civil Service Commission in September, 1942, that he was qualified thereunder, and that his name was placed on the register of Attorney eligibles.

6. That on or about August 1, 1943, the plaintiff was employed as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, Washington, D. C., that he thereafter successfully completed his probationary or trial period of one year, that he has at all times since August 1, 1943 served continuously in said position until the present time, and that he is still actively engaged in the performance of the functions of said position.

7. That, during all times in said continuous period of service as Attorney P-3 for four years less approximately two months, the efficiency rating of plaintiff has been good or better and is now "Very Good."

8. That the plaintiff has established Veteran's Preference under the laws of the United States and the rules and regulations of the United States Civil Service Commission and of the United States Department of Agriculture and is a Veteran's Preference eligible employed on active duty in

the Farmers Home Division of the Office of the Solicitor, United States Department of Agriculture, being employed previous thereto in the Production and Subsistence Division thereof prior to May 29, 1947.

3 9. That about 5:30 P. M. on May 29, 1947, the plaintiff received a written notice on Form OP-16, over the signature of W. Carroll Hunter, Solicitor of the United States Department of Agriculture, stating that a reduction in force brought about by lack of funds necessitated plaintiff being separated, effective on or after June 30, 1947 c. o. b. and that plaintiff's last day of active duty in his present position will be June 6, 1947; and that the original of said notice on Form OP-16 is hereto attached as Exhibit "A" and by reference made a part hereof.

10. That the plaintiff was also in receipt of a mimeographed memorandum over the signature of W. Carroll Hunter dated May 29, 1947, directed from the Solicitor to All Employees of the Office of the Solicitor, stating in part that "The following reorganization of the Washington Office is hereby made effective immediately . . . The functions of the former Farm Ownership Division and Production and Subsistence Division are transferred to the Farmers Home Division. Mr. Howard Rooney will be Chief of this Division." That the original of said mimeographed memorandum is hereto attached as Exhibit "B" and by reference made a part hereof.

11. That on June 4, 1947, the plaintiff prepared and delivered to the said W. Carroll Hunter, Solicitor, a letter denying the legality of said purported notice of separation, stating the reasons for such illegality, requesting that said notice of separation be rescinded, and requesting that plaintiff be retained in his position and employment; and that a copy of said letter is hereto attached as Exhibit "C" and by reference made a part hereof. That to said letter there has been up to this time no response.

12. That plaintiff's military service in the armed forces during World War One entitles plaintiff to preference in

certifications for appointment, in appointment, in reinstatement, in reemployment, and in retention in such position and functions, in accordance with the provisions of the Veterans' Preference Act of June 27, 1944 and of Sections 1, 12, 14, 15, and other applicable sections thereof (Title 5, Sections 851, 861, 863, 864, U. S. C. A.).

13. That inter alia such law provides (5 U. S. C. A. Sec. 861): "That preference employees whose efficiency ratings are good or better shall be retained in preference to all competing employees". That plaintiff's efficiency rating has at all times been good or better. That plaintiff is informed and believes and so alleges that the personnel records of the Office of the Solicitor show that there are many Attorneys in the Office of the Solicitor, Department of Agriculture, who did not receive any such notice of separation and who do not have any status as military preference employees for such retention, and to whom notice of separation could and should have been issued for the specified purpose of reduction of personnel by reason of lack of funds; and that the issuance of such purported notice of separation to plaintiff, a preference employee under the Veterans' Preference Act of 1944, was contrary to law and in violation of the rights of plaintiff as such preference employee in the premises.

14. That inter alia such law provides (5 U. S. C. A. Sec. 861): "That when any or all of the functions of any agency are transferred to, or where any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions." That plaintiff is qualified for such position and functions, that plaintiff has been for several years and is now engaged in the satisfactory performance of the duties of such position and functions, and

that plaintiff is entitled under the law to preference in transfer to or retention in such position and functions in such replacing agency, the Farmers Home Division, in the place and stead of the former Production and Subsistence Division.

15. That in the premises the purported notice of separation hereinabove alleged in Paragraph 9 and such attempted separation of plaintiff from his position and employment are unauthorized, illegal and void, but that a controversy exists between plaintiff and defendant in respect to the legality and sufficiency of such notice and attempted separation, and that plaintiff is entitled to a declaratory judgment with respect thereto.

16. That plaintiff further alleges that the law provides inter alia (5 U. S. C. A. Sec. 863): that such "indefinite preference eligible . . . shall have at least thirty days' advance notice . . . "; and that said purported notice of separation dated May 29, 1947 is defective in such respect and on such additional ground is unauthorized, illegal, and void.

17. That the plaintiff has made due demand upon the defendant, his agents and employees, that plaintiff be accorded rescission of said purported notice of separation and that plaintiff be retained in his said position and employment, but that the said defendant, his agents and employees charged by law with the administration and supervision of the employees of the United States Department of Agriculture and the Office of the Solicitor thereof have failed, refused, or neglected to rescind such purported notice of separation and to retain the plaintiff in his said position and employment, and that, unless the defendant is restrained from so doing by this Court, the defendant will wrongfully and illegally separate the plaintiff from his position and employment in Government service, and that the plaintiff has no adequate, speedy and practicable remedy at law.

WHEREFORE the plaintiff prays:

1. That due process of this Court issue directing and commanding the defendant to appear and answer this bill of complaint.

2. That this Court issue a temporary restraining order or temporary injunction restraining the defendant, his agents and employees, from separating the plaintiff from his position as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, until such time as the Court shall determine the issues involved in this litigation, and that the Court on final hearing order that the temporary restraining order or temporary injunction be made permanent.

3. That the Court render a declaratory judgment that the defendant's notice of separation dated May 29, 1947 purporting to separate plaintiff from his position and active performance of his functions thereunder was unlawful, illegal and void under the laws of the United States and that plaintiff is entitled to preference in retention and retention in such position until such time as he may be lawfully and properly removed or separated therefrom.

4. That because of the illegal and unlawful acts of the defendant the plaintiff have, and recover from the defendant personally, the costs of this action.

5. That the plaintiff have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER
Robert D. Elder, *Plaintiff*

C. L. DAWSON
C. L. Dawson
Attorney for the Plaintiff
917 15th Street, N. W.
Washington, D. C.

[Notarial Certificate omitted.]

• • • • • • • • • •

7 Filed Jun 5 1947

Plaintiff's Exhibit A.

Form OP-16 (Revised May 22, 1947)

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
(Bureau)

Washington, D. C.
(Location)

May 29 1947

Retention Subgroup of Employee B-1

To: Robert D. Elder.

From: Solicitor.

Subject: Notice To Employee Affected By Reduction In Force.

A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, 1947 c. o. b. Your last day of active duty in your present position will be Jun 6 1947 c. o. b.

You have the following rights and privileges:

1. If you are an employee in retention subgroup A-3 or A-4 or in retention group B or C, you are entitled to 30 days' minimum notice of reduction in force action. If you are an employee in retention subgroup A-1 or A-2 you are entitled under normal circumstances to 1 year's notice of separation. If you are an employee in subgroup A-1 or A-2 and you are given less than 1 year's notice, such notice is based on a waiver granted by the Civil Service Commission due to lack of funds. If you are an employee in subgroup A-1 or A-2 occupying a position subject to the Civil Service Act and you are given less than 1 year's notice, you are entitled to the same consideration for placement in other positions as you would have if given the 1 year's notice of separation.

2. After your last day of active duty the remainder of the notice period will consist of your accrued annual leave and

nonpay status thereafter. If you have any unused annual leave still to your credit as of the effective date of your separation you will be given a lump-sum payment for this amount.

3. You may examine Personnel Circular No. 94 which contains reduction-in-force procedures as they apply in the Department, records which form the basis of this reduction in force, and the list on which your name appears. These are available Personnel Section, Room 2103 South Building.

4. You may appeal to the Civil Service Commission if you consider that this proposed action violates your rights or if you are denied the right to examine records, regulations and/or reduction-in-force lists. You have 10 days from receipt of this notice to appeal to the appropriate Civil Service Office which is located at 7th and F Streets, N. W., Washington, D. C.

8 5. Your personnel representative, Pauline C. Wood will be glad to give you information regarding the procedure for exercising any restoration or reemployment rights which you may have in another Federal agency, the channels through which you may apply for other government employment and the procedure for securing a refund of retirement deductions provided that you are eligible to apply for such refund. Upon request, you will be issued a "Release From Employment" to serve as your statement of availability when seeking other Federal employment.

6. You are entitled to further consideration for placement in other positions. Appropriate action is being recommended to assure this consideration.*

W. CARROLL HUNTER,
Employment Officer.

Note: This notice may be considered based on the availability of appropriations.

* Applicable only to employees in retention Group A and subgroup B-1 occupying positions subject to the Civil Service Act.

9 Filed Jun 5 1947

Plaintiff's Exhibit C.

Washington 25, D. C.

Honorable W. Carroll Hunter
Solicitor
Department of Agriculture
Washington, D. C.

Dear Mr. Hunter:

Subject: Veteran's Preference for Retention or Reinstatement in Employment.

On May 29, 1947 I received notice on Form OP-16, over your signature, that a reduction in force brought about by lack of funds necessitated my being separated, effective on or after June 30, 1947 c.o.b. and that my last day of active duty in my present position will be June 6, 1947.

On June 5, 1947 I first received your mimeographed memorandum dated May 29, 1947 to all employees of the Office of the Solicitor stating that "The following reorganization of the Washington Office is hereby made effective immediately . . . The functions of the former Farm Ownership Division and Production and Subsistence Divisions are transferred to the Farmers Home Division. Mr. Howard Rooney will be Chief of this Division." Accordingly, I have been and am engaged in performance of the functions in the Farmers Home Division substantially as in the previously designated production and subsistence Division.

I respectfully request that the aforesaid notice of separation dated May 29, 1947 be rescinded, and that I be certified for retention, appointment or reappointment with a view to continued employment in the functions of said Farmers Home Division as the same have been, are being, and may be assigned to me in such civilian position for the following reasons:

(1) That I have served in the infantry branch of the armed forces of the United States for over one year, during the World War One of 1917-1918, and have been separated therefrom under honorable conditions pursuant to an honorable discharge dated December 9, 1918, as Captain, Infantry, United States Army, and as the same, so appears in the personnel records of the Office of the Solicitor.

(2) That by reason of such military service in the armed forces I am entitled to preference in certification for appointment, in appointment, in reinstatement, in reemployment; and in retention in such civilian position, in accordance with the provisions of the Veterans Preference Act of June 27, 1944 and of Sections 1, 12, 14, 15, and other applicable sections thereof (Title 5, Secs. 851, 861, 863, 864, U.S.C.A.).

(3) That inter alia, the law provides (5 U.S.C.A. 861): "That preference employees whose efficiency ratings are good or better shall be retained in preference to all competing employees . . . [underscoring supplied] that my last efficiency rating was "Very Good"; that the personnel records of the Office of the Solicitor show that there are many Attorneys in the Office of the Solicitor who did not receive notice of separation and who do not have status as military preference employees for such retention, and to whom notice of separation could and should have been issued for the specified purpose of reduction of personnel by reason of lack of funds; and that the issuance of notice of separation to the undersigned, a preference employee, was contrary to law and in violation of the rights of such preference employee in the premises.

(4) That, inter alia, the law provides (5 U.S.C.A. Sec. 861): "That when any or all of the functions of any agency are transferred to, or where any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in

positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions;" that the undersigned is qualified for such position and functions, and has been for several years and is now engaged in the performance of the duties of such position and functions, and is entitled under the law to preference in transfer to such position and functions in such replacing agency, Farmers Home Division.

(5) That, in view of the foregoing, the notice of separation to the undersigned was issued inadvertently, was in error, was in violation of the veteran's preference rights of the undersigned in the premises, and should be rescinded.

(6) That, inter alia, the law provides (5 U.S.C.A. Sec. 863) that such "indefinite preference eligible . . . shall have at least thirty days' advance written notice . . ."; that said purported notice of separation dated May 29, 1947 is defective in such respect, and for such additional reason should be rescinded.

Your usual prompt response in such matters will be more than appreciated.

11 I take this opportunity to express my high personal esteem and my deep appreciation of the privilege of association with you in legal service for the United States of America.

Sincerely yours,

ROBERT D. ELDER,
Attorney, P-3, B-1.

. . . . . .

12 Filed Jan 24 1947

Civil Action No. 2336-47

Amended Complaint.

Suit to Compel the Retention of Plaintiff, An Honorably Discharged Veteran of the United States, In a Position as Attorney Under the Jurisdiction of the Defendant, For a Declaratory Judgment, and For Such Other and Further Relief as to the Court May Appear Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

Plaintiff realleges Paragraphs 1 to 17 inclusive of the original complaint filed herein June 5, 1947, together with all exhibits and prayers for relief. Plaintiff further alleges:

18. That an actual controversy exists between plaintiff and defendant in respect to plaintiff's right to retention and that plaintiff is entitled to a declaratory judgment of this Court declaring that plaintiff has the right to be retained in his position in preference to all other competing employees and before any additional employee from any other source may be appointed for such position; that such right to retention is secured to plaintiff under Section 12 of the Veterans' Preference Act of 1944 (5 U. S. C. A. 861); that the words "in preference to all other competing employees" are used in Section 12 of the Act in the ordinary and usual sense of in preference to all other employees who are capable of performing work performed by plaintiff

13 in such position or who have been assigned or may be assigned to perform all or any part of such work in the place and stead of plaintiff, regardless of the formal designation of any of such other employees as in grades P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, or other grades. Such other employees, regardless of grade, must be held to be in the posture of striving and competing with plaintiff for the right to do the same work the plaintiff has been doing and

seeks to continue to do; and all such other competing employees must necessarily yield in this matter to the mandatory preference to be retained that is secured to plaintiff as a Veterans' Preference employee by Congress in this statute.

19. That the work, functions, and duties performed by plaintiff in his position still exist, will continue to exist, and must necessarily continue to be performed by an employee or employees capable of performing them. That as of the time of filing this amended complaint the work formerly performed by plaintiff is being assigned to and performed by other Attorneys in grades of P-7, P-6, P-5, P-4, who are thus supplanting and competing with plaintiff for performance of the work, service, duties and functions which plaintiff has been performing for years under assignments and is entitled to continue to perform. That the work, service, functions and duties, and work assignments of the Attorneys in the Office of the Solicitor, United States Department of Agriculture, are to a large extent interchangeable throughout the grades P-3 to P-7 inclusive, and plaintiff is informed and believes and so alleges that he is capable and qualified by experience and training to fill and discharge any of the work, service, functions, duties, and work assignments of Attorneys in any of the aforesaid grades. That plaintiff has in fact performed many of such work assignments, work, service, functions and duties of such grades P-3 to P-7 inclusive during the past four years less two months. That plaintiff has been a practicing attorney with years of experience in complicated litigation involving large sums of money and extensive property rights from 1915 on (see as counsel in chief for argument in 237 Fed. 966, CCA 8, year 1916, successful on appeal), and has appeared in argument before all the Colorado State and Federal
14 courts including the United States Circuit Court of Appeals (8th, 10th) and sundry State and Federal commissions throughout the years prior to 1943. That plaintiff has been successively a member of the House of

Representatives and the Senate of the State of Colorado, and is a graduate of Princeton University with degree of A. B., and of Columbia University Law School with degrees of A.M. and LL.B. in law.

20. That plaintiff is entitled to a declaratory judgment of this Court declaring that plaintiff has acquired and is entitled to competitive status as an Attorney in Government employment, together with all the rights and privileges appertaining to such competitive status, under Executive Order 9830 and also under Civil Service Rule III. That plaintiff is entitled to such declaratory judgment because of the following facts alleged herewith:

(a) That an actual controversy exists between plaintiff and defendant in respect to plaintiff's right or lack of right to such competitive status and his rights and privileges thereunder;

(b) That in September, 1942, the plaintiff took and received an eligible rating in a written open competitive examination given by the United States Civil Service Commission for the position of Attorney, such examination consuming a full working day pencil in hand at top pressure;

(c) That said open competive examination was appropriate for the position of Attorney afterwards and now occupied by plaintiff;

(d) That, as plaintiff is informed and believes and so alleges, upwards of 14,000 lawyers took said open competitive examination throughout the United States, of whom less than 2,000 received eligible ratings;

(e) That plaintiff received and was entitled to receive a probational appointment through said open competitive examination and under such appointment was placed on active duty on or about August 1, 1943, in the position of Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture;

(f) That said appointment was stated to be limited to the duration of the war and six months thereafter, but it was not limited to one year or less nor for any period that can

be accurately described as other than indefinite, since the war is still officially in esse and may well continue indefinitely, even beyond the reasonable hope of lifetime of both plaintiff and formal defendant in this suit, before being declared officially at an end, and plaintiff has already served for over four years less two months under such appointment; that such appointment does not come within the definition of a "temporary appointment" (Section 2.114, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register), and accordingly said appointment is mandatorily a probational appointment pursuant to Section 2.113, Civil Service Rule II, published May 1, 1947 at page 2834, Volume 12, Number 86 of the Federal Register, which provides: "Probational appointment. (a) A person selected for other than temporary appointment shall be given a probational appointment. The first year of service under this appointment shall be a probationary period. . ."

(g) That plaintiff successfully completed said probationary period of one year and was officially notified of his completion thereof, and has satisfactorily served three years less two months in addition thereto;

(h) That the right to competitive status was accordingly acquired by and is secured to plaintiff by and under Section 3.1 (a) and also by and under Section 3.1 (b) (7) of Rule III, Part 3 of Executive Order No. 9830 dated February 24, 1947, published on page 1262 of the Federal Register of February 25, 1947, and republished as revised Civil Service Rules on page 2835 of the Federal Register of May 1, 1947, as Section 3.1 (a) and Section 3.1 (b) (7), which provide as follows: "Part 3—Acquisition of a Competitive Status—. Civil Service Rule III"—Sec. 3.1. Classes of persons who may acquire status. (a) A person may acquire a competitive status by probational appointment through competitive examination, or by statute, Executive order, or this Rule. (b) Subject to such noncompetitive examination time limits, or such other requirements as the Commission may pre-

scribe, the following classes of persons may acquire a competitive status: (1) . . . (7) An employee who has served at least one year and has received an eligible rating in an open competitive examination appropriate for the position occupied: Provided, that the lowest rating reached in the regular order of certification does not exceed his rating by more than five points; Provided further, that such employee is about to be replaced as a result of certification by the Commission. A non-veteran employee may not be granted status until all preference eligibles standing higher on the register have been given appropriate consideration under the Veterans' Preference Act."

(i) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed by the aforesaid official notification of plaintiff on or about August 3, 1944, that plaintiff had successfully completed his probational period of one year under such appointment;

(j) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed in each of three successive calendar years after 1944 by the granting and payment to plaintiff in each of the years 1945, 1946 and 1947 of a within-grade salary advancement under Section 7 of the Classification Act of March 4, 1923 as amended, and said within-grade salary advancements were on each occasion explicitly designated as such and were distinct from and in addition to the contemporaneous increases of salaries granted to Government employees by Congress for the purpose of meeting their increased cost of living; that such within-grade salary advancements are a privilege possessed solely by employees of permanent competitive status and are not and cannot be either granted or paid to any temporary employee but only to an employee of competitive status occupying a permanent position, as so provided by the express provisions of

Section 2.114 (f) of Part 2, Civil Service Rule II, published at page 2835 of the Federal Register of May 1, 1947, in Volume 12, Number 86 thereof, and by like rules in force prior thereto;

(k) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed at all times from and after August 3, 1944, by the bi-weekly deduction from plaintiff's salary, as paid, of proportionate amounts
17 thereof for the purpose of providing for plaintiff's retirement benefits, and all such amounts so deducted have been withheld from plaintiff in the Civil Service Retirement Fund subject to the Civil Service Retirement Act; that the benefits of said Civil Service Retirement Act, and all retirement benefits and salary deductions for the purpose thereof, are privileges possessed solely by employees of permanent competitive status, and are not and cannot be accorded to and/or deducted from the salary of any temporary employee, but such benefits can only be accorded to and salary deductions for such purpose can only be made from the salary of an employee of competitive status occupying a permanent position, as so limited by the express provisions of the same Section 2.114 (f) of Part 2, Civil Service Rule II, referred to under the foregoing sub-paragraph (j).

21. That on or after May 1, 1947, plaintiff received a mimeographed memorandum dated May 1, 1947, over the signature of W. Carroll Hunter, the Solicitor, a copy of which is hereto attached as Exhibit "D" and by reference made a part hereof. That in connection with same defendant made up a purported retention and separation register in which plaintiff was illegally assigned a right of retention below and inferior to that of a large number of non-veteran employees whose rights to retention in law and fact are below and inferior to the Veterans' Preference right of plaintiff to "be retained in preference to all other com-

peting employees". That said memorandum and the purpurported retention and separation lists assumed to have been made up thereunder, pursuant to which notice of separation was illegally issued to plaintiff May 29, 1947, were in violation of law and regulations, and were unauthorized and void insofar as the retention rights of plaintiff have been or may be adversely affected thereby; and that plaintiff is entitled to a declaratory judgment of this Court so declaring. That there have been violated thereby the following: Section 1753 of the Revised Statutes (5 U. S. C. A. 631; The Civil Service Act of January 16, 1883 as amended (22 Stat. 403); the Act of August 23, 1912, as amended by the Act of February 28, 1916 (5 U. S. C. A. 648); the Veterans' Preference Act of June 27, 1944 (5 U. S. C. A. 851 et seq.); the Appropriation Act of 1947 (Public Law 334—79th Cong.); Executive Order No. 9830 of February 24, 1947, published in the Federal Register of February 25, 1947, effective and republished in the Federal Register May 1, 1947, particularly Rule II and Rule III thereof, Rule VI "Exceptions from competitive service"; Title 5—Administrative Personnel—revised Civil Service Rules published in the Federal Register May 1, 1947, placing in effect as of that date Executive Order No. 9830 dated February 24, 1947; United States Civil Service Commission Departmental Circular No. 497 Supplement No. 2 dated April 15, 1947; and other statutes, Executive Orders, Rules, regulations, circulars and memoranda referred to, cited in, and connected therewith, all of which are also hereby pleaded by reference.

18

That the defendant, his agents and employees, in violation of the above lawful provisions and in disregard of the fact that plaintiff has been and is competing with Attorneys of grades P-4, P-5, P-6, and P-7 for the right to perform work formerly performed by him, have unlawfully assumed to restrict plaintiff to a "competitive level" confined to grade P-3 Attorneys in a so-called Group B-1. That the defendant, his agents and attorneys and employees, have

in like illegal manner assumed to restrict plaintiff to a so-called "competitive area" confined to "the Washington Office". That such status, area and level restrictions were and are in violation of these statutes and are contrary to the order of your defendant, the Secretary of Agriculture, set forth in his Memorandum No. 1131 dated October 24, 1945, wherein this defendant proclaimed inter alia: "The obligation to continue them (veterans) in employment status is department-wide where there are positions available which they can fill." That a facsimile copy of said Memorandum No. 1131 dated October 24, 1945 is hereto attached as Exhibit "E" and by reference made a part hereof.

That there are many positions available, department-wide, which plaintiff can fill and the work of which he is capable of doing. That an actual controversy exists between plaintiff and defendant in regard to all the above matters and the illegality thereof, and that plaintiff is entitled to a declaratory judgment of this Court declaring that the plaintiff's Veterans' Preference right to retention in employment may not lawfully be restricted to any area less than department-wide, nor to any such formal level;

19 that plaintiff's right to retention must necessarily be extended to any position the work and duties of which the plaintiff has satisfactorily performed with an efficiency rating of good or better, and to any departmental position, regardless of its categorical level or alphabetical designation, the work and duties of which may reasonably be deemed within the capabilities of an employee of plaintiff's experience and training; that the mandatory requirements of the Veterans' Preference Act of 1944 are that a Veterans' Preference employee must be given any available work for which he is reasonably adapted, and where his efficiency rating in a position is good or better, such Veterans' Preference employee must be retained in such position in preference to any other employee or employees whatsoever, and so retained before any of the work, functions or duties of such position may be assigned or parceled out to any other

employee or employees; and so long as the efficiency rating of a Veterans' Preference employee as the occupant of a position is good or better, so long does he retain that position against all the world, under and by virtue of the provisions of this Act.

22. That prior to September, 1942, and prior to the enactment June 27, 1944 of the Veterans' Preference Act of 1944, the plaintiff had duly established Veterans' Preference eligibility under then existing laws and has at all times since September, 1942 been possessed of, entitled to the protection of, and vested with all rights and privileges granted under any existing law, including in particular the Act of August 23, 1912, c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat. 15 (5 U. S. C. A. 648), which provides inter alia: "Provided, that in the event of reductions being made in the force of any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary." That plaintiff's rights under such existing law of 1912 are expressly secured and preserved by Section 18 of the Veterans' Preference Act of 1944, 58 Stat. 391 (5 U. S. C. A. 867) which provides inter alia: ". . . and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law. . ."

That an actual controversy exists between plaintiff and defendant in respect of plaintiff's possession of any of such rights of retention, security against discharge and reduction in pay, and that plaintiff is entitled to a declaratory judgment of this Court declaring that Plaintiff, as an honorably discharged soldier whose record is rated good or better with the Office of the Solicitor, United States Department of Agriculture, has the right, mandatory upon this defendant, his agent and employees, not to be discharged or dropped or reduced in rank or salary in the event of any reduction in force.

23. That the plaintiff has and will continue to have the lawful right to be on active duty in his position from and after June 6, 1947. That plaintiff is and will thereafter continue to be entitled to occupy the same status and privileges that were his at the time this suit was brought, and is and will thereafter be entitled to have the benefit of all compensation, benefits and privileges that would flow from his continuity of service on active duty from and after the close of business June 6, 1947. That, since the defendant, his agents and employees, were without authority to issue notice of separation to plaintiff in the premises, or to separate plaintiff, any such separation or exclusion of plaintiff from active duty by defendant, his agents and employees, pursuant to such illegal notice, is unlawful and will continue to be unlawful, and plaintiff will be entitled to an order of this Court directing defendant to restore plaintiff to active duty forthwith and holding that plaintiff has been continuously employed in the Office of the Solicitor, United States Department of Agriculture, from and after the close of business June 6, 1947, to and until the time of the final determination of this suit, and holding that plaintiff is entitled to have the benefit of all compensation, benefits and privileges that would flow from such continuity of service on active duty. That since the defendant has been notified of the pendency of this suit seeking an injunction against him, the defendant henceforth acts at his peril and subject to the power of the Court to restore the status.

21. That plaintiff's present salary is at the rate of $4,525.80 per annum. That plaintiff is informed by the personnel office of the Office of the Solicitor that he has eighty-seven days and four hours of accrued annual leave to his credit as of the close of business June 6, 1947. That plaintiff is entitled to all such accrued annual leave and to all of his accrued sick leave, none of which sick leave plaintiff has ever taken. That plaintiff is entitled to all annual and sick leave, and to all within grade promotions, all within-grade increases of salary, all retirement rights, and all

benefits, privileges and emoluments that would normally accrue to plaintiff's benefit during the period subsequent to his wrongful and illegal separation from active duty at the close of business June 6, 1947, to and until plaintiff's restoration to such active duty.

24. That on Monday, June 9, 1947, the first business day after June 6, 1947, the plaintiff reported in person for duty to the proper official and at the proper place for reporting for duty, namely to Mr. Howard Rooney, Chief of the Farmers Home Division, Office of the Solicitor, United States Department of Agriculture, Washington, D. C., in his office in the South Agriculture Building. The plaintiff thereupon demanded of said Chief that plaintiff be retained in his position of Attorney P-3 and retained on active duty and given work to do. That said Chief thereupon refused said demands and stated orally that plaintiff was definitely and finally separated from active duty and was on no account to do or be paid for doing any further Government work for the Department, and that plaintiff would be paid for nothing but his accumulated annual leave until final separation from his position pursuant to the notice of separation dated May 29, 1947. That plaintiff then made like demands upon Mr. Robert L. Farrington, Associate Solicitor over the Farmers Home Division, and upon Mr. W. Carroll Hunter, Solicitor and head of the Office of the Solicitor, United States Department of Agriculture, and finally, in writing, upon Hon. Clinton P. Anderson, Secretary of Agriculture, and that each of said officials refused plaintiff's demands. That throughout each and every business day since June 6, 1947 and until the time of filing this amended complaint, the plaintiff has been present in person at his office, Room
22 2340 in said Farmers Home Division, South Agriculture Building, and has daily requested work to do, and that each and all of such requests have been with uniform courtesy refused. That plaintiff is ready, able, willing and desirous of performing any work assignment that may be given him and will continue to be so until the final deter-

mination of this suit; and that plaintiff has so informed all the Departmental officials above named. That it is plaintiff's intention to persist in such daily attendance, requests and insistence upon his right to be retained on active duty as an Attorney in the United States Department of Agriculture.

25. That defendant has wrongfully excluded and separated plaintiff from active duty in his position and in the Department of Agriculture and will continue to do so, and do so permanently, unless otherwise ordered by this Court.

26. That plaintiff has no plain, adequate and complete remedy at law, and has no plain, adequate and complete remedy of any sort save and except at the hands of this Court.

WHEREFORE, the premises considered, the plaintiff prays:

1. That process issue from this Court commanding the defendant to answer this suit and amended complaint.

2. That preliminary mandatory injunction issue directing the defendant to restore plaintiff to active duty forthwith.

3. That final mandatory injunction issue directing the defendant to restore plaintiff to duty in possession of and in accordance with all the rights, privileges, and benefits that plaintiff enjoyed at the time of the wrongful separation from active duty, and to permit plaintiff to receive all the rights, benefits, and privileges that would normally flow from a continuity of service on active duty from the time of the wrongful separation up to and including the final order of this Court.

4. That the Court render declaratory judgment in favor of the plaintiff, declaring:

23

I

That the defendant's notice of separation dated May 29, 1947, purporting to separate plaintiff from active duty, and from his position of Attorney P-3 and performance of his functions thereunder, was unlawful, illegal and void under the laws of the United States.

II

That plaintiff is entitled to preference in retention and to retention in active duty in such position and in Government employment.

III

That plaintiff has the right to be retained in his position in preference to all other competing employees and before any additional employee from any other source may be appointed for such position. That such right to retention is secured to plaintiff under Section 12 of the Veterans' Preference Act of 1944 (5 U.S.C.A. 861). That the words "in preference to all other competing employees" are used in Section 12 of the Act in the ordinary and usual sense of in preference to all other employees who are capable of performing the work performed by plaintiff in such position, or who have been assigned or may be assigned to perform all or any part of such work in the place and stead of plaintiff, and this regardless of the formal designation of any such other employees as in grades P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, or other grades. Such other employees, regardless of grade, must be held to be in the posture of striving and competing with plaintiff for the right to do the same work the plaintiff has been doing and seeks to continue to do. All such other competing employees must necessarily yield in this matter to the mandatory preference to be retained in his position that is secured to plaintiff by Congress in this statute.

IV

That plaintiff has acquired competitive status as a Government employee by probational appointment through an open competitive examination appropriate for the position occupied, by satisfactory completion of his probational period of one year under said appointment, and by the
24 granting to plaintiff of within-grade salary advancements, potential retirement benefits, and other re-

ciprocal privileges and obligations incompatible with the rights of any other than an employee of competitive status occupying a permanent position. The Court holds plaintiff to be such an employee.

V

That, even had the plaintiff not acquired competitive status, the plaintiff's Veterans' Preference right to retention in his position is not and cannot be lawfully limited to the duration of the war and six months thereafter, nor be limited to any definite period of time whatsoever. Such right to retention must be held to continue indefinitely, subject only to modification by reason of any failure on plaintiff's part to maintain the efficiency ratings prescribed by the Veterans' Preference Act of 1944, or of plaintiff's attainment of retirement age, or of the duly established existence of any other statutory grounds that may authorize plaintiff's resignation, separation, or removal; and such Veterans' Preference right to retention may not otherwise be cut off, cut down, shortened, nor in any other manner be interfered with by any administrative policy nor by any administrative action whatever.

VI

That plaintiff, as an honorably discharged soldier whose record is rated good or better, has the right which is mandatory upon this defendant, his agents and employees, that plaintiff shall not be discharged, dropped, or reduced in rank or salary in the event of any reduction in force. Such right is secured to plaintiff by the Act of August 23, 1912, c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat. 15 (Title 5 U.S.C.A. 648), and by Section 18 of the Veterans' Preference Act of 1944, 58 Stat. 391 (Title 5 U.S.C.A. 867).

VII

That the memorandum dated May 1, 1947 over the signature of W. Carroll Hunter, Solicitor, relating to "Subject: Status of Attorney Positions under New Civil Service Rules", and all purported retention and separation registers or lists, and all acts of defendant, his agents and employees, thereunder or pursuant thereto, were and are unlawful, unauthorized and void under the laws of the United States insofar as the retention rights of the plaintiff, a Veterans' Preference employee whose efficiency rating is good or better, have been or may be adversely affected thereby. The defendant, his agents and employees, have no lawful authority to make any order, nor to adopt any regulation or administrative policy, nor to take any administrative action whatsoever which does not accord plaintiff the full measure of preference provided by the Veterans' Preference Act of 1944 and other existing laws, Executive Orders, and Civil Service Rules.

VIII

That the plaintiff's Veterans' Preference right to retention in employment may not lawfully be restricted to any area less than department-wide nor to any formal grade P-3 position, Group B-1, nor other artificial limits. That plaintiff's Veterans' Preference right to retention must necessarily be extended to any position the work and duties of which the plaintiff has satisfactorily performed with an efficiency rating of good or better, and to any departmental position, regardless of its categorical level or alphabetical designation, the work and duties of which may reasonably be deemed within the capabilities of an employee of plaintiff's experience and training. That the mandatory requirements of the Veterans' Preference Act of 1944 are that a Veterans' Preference employee must be given any available work for which he is reasonably adapted; and where his efficiency rating in a position is good or better,

such Veterans' Preference employee must be retained in such position in preference to any other employee or employees whatsoever, and so retained before any of the work, functions or duties of such position may be assigned or parceled out to any other employee or employees. Under and by virtue of the provisions of this Act of 1944, so long as the efficiency rating of a Veterans' Preference employee is good or better as the occupant of a position, so long does he retain such position against all the world.

26 5. That, because of the unlawful acts of the defendant, the plaintiff have and recover against the defendant the costs of this action.

6. That the plaintiff may have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER,
Plaintiff.

C. L. DAWSON
Attorney for the Plaintiff
917 15th Street, N.W.,
Washington, D. C.

[Notarial Certificate omitted.]

27 Filed Jun 24 1947

Plaintiff's Exhibit "D".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

May 1, 1947

To: All Attorneys, Office of the Solicitor
From: Solicitor
Subject: Status of Attorney Positions under New Civil Service Rules

By Executive Order 9830 of February 24, 1947, the Civil Service rules have been amended, effective May 1, 1947.

Prior to May 1 there existed three possible categories in which attorney appointees were classified: (1) attorneys with competitive status acquired either through (a) classification under the Ramspeck Act and Executive Order 8743, (b) transfer from a probational or permanent appointment in attorney or other than attorney positions, or (c) reinstatement after a break in service; (2) war service appointments which were effected under the War Service Regulations, for the most part those appointed on or after March 16, 1942 and who did not enjoy permanent status in any prior Federal employment; and (3) attorneys serving under temporary indefinite appointments under the temporary Civil Service Regulations which were in effect from March 6, 1946 to April 30, 1947. The amended rules, although they provide that appointments to attorney positions are to be made without examination by the Civil Service Commission under Schedule A, contain a provision that whenever any attorney position is occupied by a person having competitive civil service status, he shall be separated from such position only in accordance with the Civil Service Rules and Regulations, as amended.

Civil Service Departmental Circular No. 497, Supplement 2, dated April 15, 1947, withdrew the authority for the continued employment of attorneys under war service or temporary indefinite appointments beyond April 30, 1947. In order to continue their employment, therefore, it has been necessary to convert all war service and temporary indefinite attorney appointments to appointments under Schedule A, effective May 1, 1947. Those concerned will receive fanfolds effecting the conversion. A limitation is being placed on all conversions limiting former war service and temporary indefinite attorney appointments to the duration of the war and six months thereafter which is, in effect, a continuation of virtually the same tenure previously enjoyed. If it is found possible to recruit new attorney personnel, all such appointments during the present war period will also carry that limitation. No change will be made

in the appointments of attorneys serving with a competitive Civil Service status.

In any future reductions-in-force of attorney personnel which it may become necessary to effect, all attorneys who have Civil Service status will be considered in Retention Group A, as they have been, and those former war service and temporary appointees whose appointments have been converted incident to the reestablishment of Schedule A will be considered in Retention Group B, as they were previously.

The definitions of the three retention groups in the order of retention preference are given below:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more.

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

Within each group, except Group A, there are four subgroups as follows:

(1) With veteran preference with efficiency rating of "Good" or better.

(2) Without veteran preference with efficiency rating of "Good" or better.

(3) With veteran preference where efficiency rating is less than "Good".

(4) Without veteran preference where efficiency rating is less than "Good".

Under Group A, the highest retention group, there are five sub-groups composed of the four sub-groups listed above and A-1 Plus. This latter category is applicable to veterans following return from military service and
29 to certain employees who transferred to other agencies with reemployment rights under Executive Orders 8973 and 9067 prior to September 27, 1942, during the one year period immediately following their return to duty. A-1 Plus is the highest sub-group for retention purposes.

In the event there are any questions regarding the status of any attorneys in this office, we shall be pleased to attempt to furnish additional information to the individuals concerned upon receipt of their requests.

W. CARROLL HUNTER.

30 Filed Jun 24 1948

Plaintiff's Exhibit "E".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

October 24, 1945

MEMORANDUM NO. 1131

Reemployment and Retention of Veterans

I wish to call your attention to and wholeheartedly endorse the policy of the Department on reemployment of veterans as stated in General Departmental Circular No. 53 issued October 9, 1944.

Reductions in force may result from reorganization of the Department's activities or due to lack of work or funds.

Veterans have legal rights for retention in the service under those conditions. The obligation to continue them in employment status is Department-wide where there are positions available which they can fill. It is the policy of the Department to observe the spirit and intent as well as the letter of the law dealing with veterans' rights.

The Director of Personnel, on the basis of the legal requirements and regulations of the Civil Service Commission, will issue procedural instructions for giving force and effect to these requirements.

Each administrator and supervisor is personally responsible for seeing that the obligations for reemployment and retention of veterans are adequately met.

CLINTON P. ANDERSON,
Secretary.

* * * * * * * * * *

31 Filed Aug 15 1947

Defendant's Motion for Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Now comes the defendant, and upon the complaint on file in this Court and upon the annexed affidavits of Lawson A. Moyer, dated August 5, 1947, and W. Edward Bawcombe, dated July 25, 1947, respectfully moves the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there are no genuine issues as to any material facts and defendant is entitled to such judgment as a matter of law and for such other and further relief as to the Court may seem just and proper.

HERBERT A. BERGSON,
Acting Assistant Attorney General.

GEORGE MORRIS FAY, by D.B.M.
United States Attorney.

Of Counsel:

JOSEPH M. FRIEDMAN,
Special Assistant to the Attorney General.

JULIUS FRIEDENSON,
Attorney, United States Civil Service Commission.

32 Filed Aug 15 1947

Affidavit in Support of Defendant's Motion for Summary Judgment.

CITY OF WASHINGTON,
District of Columbia, ss:

Lawson A. Moyer, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission. This affidavit is submitted in support of a Motion for Summary Judgment made by the defendant in the above-entitled action.

On an undated communication received by the United States Civil Service Commission on June 6, 1947 the plaintiff, Robert D. Elder, filed with the Civil Service Commission an appeal from his separation from the position of attorney, P-3, Department of Agriculture, Office of the Solicitor. An investigation of the facts was conducted by the Civil Service Commission, as a result of which it was found by the Commission that the plaintiff's separation was effected in full compliance with Section 12 of the Veterans' Preference Act of June 27, 1944 (58 Stat. 387) and
33 the Retention Preference Regulations promulgated by the Civil Service Commission pursuant thereto (12 F. R. 2849).

Plaintiff was accordingly notified by the Civil Service Commission on July 14, 1947 that his appeal was denied. A copy of this notice is attached hereto and made a part hereof.

LAWSON A. MOYER.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 5 day of Aug., 1947.

H. E. SENEDER,
Notary Public.

(Seal)

My Commission expires Jan. 1, 1951.

Letter.

34 UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

July 14, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

The investigation of your appeal from separation by reduction in force from your position in the Office of the Solicitor, Department of Agriculture, has been completed.

Information obtained disclosed that you were properly reached for reduction in force action and received due written notice of your proposed separation. Since you are in a position which is excepted from the Civil Service Act and Rules, it is not mandatory that you be offered reassignment to a continuing position under Section 9 of the Retention Preference Regulations.

In view of the fact that your rights under the Retention Preference Regulations have been observed in the action

taken in your case, you are advised that your appeal is denied.

Very truly yours,

JOHN A. OVERHOLT, *Chief,*
Efficiency Ratings,
Administration Section,
Personnel Classification Division.

* * * * * * * * * * *

35 — Filed Aug 15 1947

Affidavit in Support of Defendant's Motion for Summary Judgment.

CITY OF WASHINGTON,
District of Columbia, ss:

W. Edward Bawcombe, being duly sworn, deposes and says:

I am the Executive Assistant to the Solicitor, Office of the Solicitor, United States Department of Agriculture. This affidavit is submitted in support of a motion for summary judgment made by the defendant in the above entitled action.

On February 16, 1942, the President, by virtue of the authority vested in him by section 2 of the Civil Service Act, issued Executive Order No. 9063 (7 F. R. 1075) authorizing the Civil Service Commission to adopt and prescribe such special procedures and regulations relating to the recruitment, placement, and changes in status of personnel in Federal service as it determined to be necessary in order that there would be no delay during the war emergency in filling positions in the Federal service with qualified persons. Said Executive Order further provided that the procedures and regulations thus adopted and prescribed were to be binding with respect to all positions affected thereby which were subject to the provisions of the Civil Service

36 Act and rules. The second paragraph of Executive

Order No. 9063 stated that persons appointed solely by reason of any special procedures adopted under authority of said order to positions subject to the provisions of the Civil Service Act and rules were not thereby to acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, might be retained for the duration of the war and for six months thereafter.

Pursuant to Executive Order No. 9063, the Civil Service Commission prepared and adopted the War Service Regulations effective March 16, 1942 (Title 5, CFR, Cum. Supp., Chap. 1, Part 18).

Under date of July 15, 1943, the Office of the Solicitor, United States Department of Agriculture, was authorized by the Legal Examining Section of the Civil Service Commission to appoint the plaintiff, Robert D. Elder, to a War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July 1, 1943. Section 7, Regulation 1, provided that:

"All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the
37 satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

Pursuant to the aforesaid authority the plaintiff was appointed on August 2, 1943, by a war service appointment, to the position of Associate Attorney, Office of the Solicitor, United States Department of Agriculture, Washington, D. C., a position subject to the aforesaid War Service Regulations.

On February 4, 1946, the President, by virtue of the authority vested in him by sections 2 and 3 of the Civil Service Act (22 Stat. 403), section 1753 of the Revised Statutes, and section 3(b) of the Civil Service Retirement Act, as amended (5 U.S.C. Supp. V. 693), issued Executive Order No. 9691 (11 F. R. 1381) providing for the termination of the War Service Regulations and authorizing the Civil Service Commission to issue temporary regulations to cover the transitional period between the expiration of the War Service Regulations and the issuance of revised Civil Service regulations. Temporary Civil Service Regulations were issued by the Civil Service Commission pursuant to the authority of the aforesaid Executive Order, effective March 7, 1946, said Temporary Civil Service Regulations superseding the War Service Regulations. The Temporary Civil Service Regulations did not require or result in any change in the nature of the appointment held by the plaintiff or in the tenure thereof.

38 Effective May 1, 1947, the President, under authority of the Constitution, section 1753 of the Revised Statutes, and the Civil Service Act of January 16, 1883 (22 Stat. 403), issued Executive Order 9830 (12 F. R. 1259) promulgating revised Civil Service Rules which specifically provide, among other things, as follows:

1. That "the words 'competitive service' shall have the same meaning as the words 'classified service' or 'classified (competitive) service' or 'classified civil service' as defined in existing statutes and Executive orders. The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom under statute or Executive order . . . " (Rule 1, 12 F. R. 1262).

2. That all attorney positions in the entire executive civil service are excepted from the competitive service and are included in Schedule A of the Civil Service Rules. (Rule VI, 12 F. R. 1263).

Pursuant to Executive Order No. 9830 and section 12 of the Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. Supp. V, 861), the Civil Service Commission issued Retention Preference Regulations for Use in Reductions in Force, effective May 1, 1947 (12 F. R. 2849). The regulations specifically provide, among other things, as follows:

1. That for the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in com-
39 petitive retention groups as follows:

Group A: With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter.

Subgroup B-1: Group B employees with veteran's preference unless efficiency rating is less than "Good". (Sec. 20.3, Part 20).

2. Employees appointed after March 16, 1942, are in Group B unless (1) they are currently holding appointments definitely limited to one year or less or (2) they are occupying positions excepted from the Civil Service Act and rules and not limited in duration. (Sec. 20.4 *id*).

3. Within each competitive level, separation actions must be taken with respect to all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, such action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached. (Sec. 20.8 *id*).

40 In accordance with the provisions of the aforesaid Civil Service Rule VI, and in view of the fact that as of May 1, 1947, the Civil Service Commission withdrew authority to continue war service appointments as such, (C. S. C. Deptl. Circ. No. 497, Supp. No. 2), the appoint-

ment of the plaintiff was converted, effective May 1, 1947, to "Excepted Appointment (Schedule A-1-4)" with no change in the tenure of the appointment and the appointment was continued specifically "limited to the duration of the war and six months thereafter".

Due to a lack of funds it became necessary in the latter part of May 1947 for the aforesaid Office of the Solicitor to initiate a reduction in force action among its employees. Due to the nature and tenure of the plaintiff's appointment he was classified in retention subgroup B-1 on the retention list prepared for use in the aforesaid reduction in force action.

On May 29, 1947, the aforesaid Solicitor gave written notice to the plaintiff that:

"A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, c.o.b. Your last day of active duty in your present position will be June 6, 1947."

The notice further stated that following the last day of active duty the remainder of the thirty days notice period would consist of accrued annual leave and nonpay status after such leave, and called attention to the plaintiff's right of appeal to the Civil Service Commission and the other rights and privileges which he had. Similar notices were given to all employees in the aforesaid office who
41 were in the same retention subgroup, competitive level, and competitive area with the plaintiff and in lower retention subgroups in said competitive level and area. The aforesaid notice, like similar notices received by other employees on the same date, was intended to be, and was treated as, definite notice, of the minimum thirty days required by the Civil Service Commission, that the recipient's appointment would be terminated in the current reduction in force. On and after June 30, 1947, the plaintiff had no right to retention in his present position unless (a) the notice was revoked, (b) the effective date of the separation pursuant to such notice was temporarily delayed

or (c) he was reappointed thereto following consummation of the separation action.

The reduction in force action in the aforesaid Office of the Solicitor was accelerated somewhat by the necessity of timing employee separations so that they would fall within the fiscal year ending June 30, 1947, and thereby permit lump sum payments for accrued and accumulated annual leave to be made out of the appropriation for that fiscal year rather than out of the 1948 fiscal year appropriation. On June 27, 1947, Congress enacted the Second Urgent Deficiency Appropriation Act, 1947, (Pub. Law No. 122, 80th Congress), which provides, in section 103, that when employees are separated from the service during July 1947 by reason of a reduction in force and have been given notice of such separation during the fiscal year 1947, lump sum payments for accumulated leave may be charged against unobligated balances of the 1947 appropriations from which the employees were paid. In view there-
42 of, and inasmuch as the amount of funds available for the aforesaid Office of the Solicitor for the fiscal year ending June 30, 1948, had not been finally determined by enactment of the Department of Agriculture Appropriation Act for 1948, the aforesaid Solicitor on June 30, 1947, notified the plaintiff, and other employees who received notices on May 29, 1947, in writing, that:

"Pending approval of the 1948 appropriation act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office."

The aforesaid notice of June 30, 1947, was given for the sole purpose of benefiting the employees receiving such notices by delaying final action upon their separations so that if sufficient funds had been provided by Congress, such employment could have been continued without prejudice to their employment status.

Since such funds were not provided, pursuant to the notice of May 29, 1947, the appointment of the plaintiff was terminated effective June 30, 1947, and the plaintiff is being paid a lump sum payment for the accumulated and accrued annual leave then to his credit. As of the same date the appointments of all other employees of the aforesaid Office of the Solicitor who were in the same retention subgroup as the plaintiff, or in lower retention sub-
43 groups, and in the same competitive level and competitive area as plaintiff were terminated.

Attached hereto and made a part hereof are certified true copies of the notice of appointment effective August 2, 1943, the notice of conversion to excepted appointment (Schedule A-1-4) effective May 1, 1947, the reduction in force notice of May 29, 1947, the notice of delay of final action on separation notice of June 30, 1947, and notice of separation effective June 30, 1947, furnished the plaintiff by the Office of the Solicitor.

W. Edward Bawcombe.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of July, 1947.

L. U. Sampson,
Notary Public.

My commission expires July 31, 1947.

* * * * * * * * * * *

45 Washington, D. C.

July 21, 1943

(Seal—U. S. Department
of Agriculture)

Name Mr. Robert D. Elder
Nature of Action: War Service Appointment, Subject to Return of an Employee from Service Under E. O. 9067

Position Associate Attorney
Grade & Salary P-3-144, $3,200 per annum (Bureau No. 1690)
Bureau Office of the Solicitor
Branch Forestry, Lands and Labor Division
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: August 2, 1943
Remarks:

This action is subject to the provisions of paragraphs listed on the other side of this notification.

By direction of the Secretary of Agriculture.

Respectfully,

Perforated T. Roy Reid 7-16-43
Director of Personnel.

THIS ACTION IS VOID UNLESS PERFORATED

46 IMPORTANT

(a) Under this appointment you are subject to the provisions of the Civil Service Retirement Act as amended. Through June 30, 1942, 3½% will be deducted from your basic salary for deposit to your credit in the Retirement Fund. On and after July 1, 1942, 5% will be deducted from your basic salary for deposit to your credit in the Retirement Fund.

(b) This appointment is subject to taking the Oath of Office (Standard Form No. 8) which should be submitted to the Chief of your Bureau or Office.

(c) Civil Service Commission Form 3464a shall be prepared in duplicate and submitted to the Department Office of Personnel through the Chief of your Bureau or Office.

(d) This appointment is for the duration of the work.

(e) This appointment is for the duration of the work, but not beyond December 31 of the calendar year in which the appointment is effective.

(f) This appointment is for such period of time as your services may be required and funds are available but not to extend beyond the date of expiration of the emergency appropriation from which your compensation is paid.

(g) This appointment is for such time as your services may be required and funds are available for Civilian Conservation Corps work.

---

47 OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

May 1, 1947

Name: Mr. Robert D. Elder
Nature of Action: Conversion to Excepted Appointment (Schedule A-1-4)

Position Attorney P-3
Grade, Salary & Position No. P-970-3-151, $4525.80 p. a. (Bureau No. 1061)
Bureau Office of the Solicitor
Branch or Div. Production & Subsistence
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: May 1, 1947
Remarks: This appointment is limited to the duration of the war and six months thereafter.

/s/ W. Carroll Hunter,
Name of Employment Officer.

---

48 Form OP-16
(Revised May 22, 1947)

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

May 29, 1947

Retention Subgroup of Employee B-1

To: Robert D. Elder
From: Solicitor
Subject: Notice To Employee Affected By Reduction In Force

A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, 1947 c.o.b. Your last day of active duty in your present position will be June 6, 1947. You have the following rights and privileges:

1. If you are an employee in retention subgroup A-3 or A-4 or in retention group B or C, you are entitled to 30 days' minimum notice of reduction in force action. If you are an employee in retention subgroup A-1 or A-2 you are entitled under normal circumstances to 1 year's notice of separation. If you are an employee in subgroup A-1 or A-2 and you are given less than 1 year's notice, such notice is based on a waiver granted by the Civil Service Commission due to lack of funds. If you are an employee in subgroup A-1 or A-2 occupying a position subject to the Civil Service Act and you are given less than 1 year's notice, you are entitled to the same consideration for placement in other positions as you would have if given the 1 year's notice of separation.

2. After your last day of active duty the remainder of the notice period will consist of your accrued annual leave and nonpay status thereafter. If you have any unused annual leave still to your credit as of the effective date of

your separation you will be given a lump-sum payment for this amount.

3. You may examine Personnel Circular No. 94 which contains reduction-in-force procedures as they apply in the Department, records which form the basis of this reduction in force, and the list on which your name appears. These are available Personnel Section, Room 2103 South Building.

4. You may appeal to the Civil Service Commission if you consider that this proposed action violates your rights or if you are denied the right to examine records, regulations and/or reduction-in-force lists. You have 10 days from receipt of this notice to appeal to the appropriate Civil Service Office which is located at 7th and F Streets, N.W., Washington, D. C.

49 5. Your personnel representative, Mrs. Pauline C. Wood, will be glad to give you information regarding the procedure for exercising any restoration or reemployment rights which you may have in another Federal agency, the channels through which you may apply for other government employment and the procedure for securing a refund of retirement deductions provided that you are eligible to apply for such refund. Upon request, you will be issued a "Release From Employment" to serve as your statement of availability when seeking other Federal employment.

6. You are entitled to further consideration for placement in other positions. Appropriate action is being recommended to assure this consideration.*

/s/ W. CARROLL HUNTER,
Employment Officer.

Note: This notice may be reconsidered based on the availability of appropriations.

* Applicable only to employees in retention Group A and subgroup B-1 occupying positions subject to the Civil Service Act.

50 UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

June 30, 1947

To: Mr. Robert D. Elder
From: Solicitor
Subject: Delay of Final Action on Separation Notice

As indicated on the reduction-in-force notice furnished you, dated May 29, 1947, your separation may be effective on or after June 30, 1947.

Pending approval of the 1948 Appropriation Act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office.

W. CARROLL HUNTER.

---

51 OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

July 25, 1947

Name: Mr. Robert D. Elder
Nature of Action: Reduction in force

Position Attorney P-3
Grade, Salary & Position No. P-970-3-151, $4,525.80 p. a.
(Bureau No. 1061)
Bureau Office of the Solicitor
Branch or Div. Production and Subsistence Division
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: June 30, 1947 c.o.b.
Remarks: Employee to be paid for 584 hours annual leave which would have carried him to October 13, 1947 c.o.b. Lack of funds.

There is no other position for which this employee has reassignment rights which is occupied by another employee subject to displacement for which this employee is qualified and willing to accept.

W. CARROLL HUNTER,
Name of Employment Officer.

* * * * * * * * * *

52 Filed Sep 5 1947

Affidavit of Robert D. Elder in Opposition to Defendant's Motion for Summary Judgment.

DISTRICT OF COLUMBIA, *ss:*

Robert D. Elder, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action and signed and verified the Complaint and the Amended Complaint therein. Prior to September, 1942, plaintiff was informed by the Denver office of the United States Civil Service Commission that the Commission would soon be giving a competitive written examination throughout the country for positions of Attorney in the Government service. Plaintiff thereupon applied to the Commission for such competitive written examination and filed with his application a certified copy of his honorable discharge dated December 9, 1918 as Captain, Infantry, United States Army. The Commission later notified him that the examination would be held in West Denver High School on a specified day in September, 1942, at which time and place the plaintiff attended, and took and passed said open competitive written examination, in which the entire day of morning and afternoon sessions was taken up. Plaintiff received an eligible rating as the result of such open competitive written examination.

53 A few days after May 29, 1947 the plaintiff examined and made penciled memoranda of the names and of the assigned "retention Subgroups" as assigned to Attorneys, Grade P-3, set out in the official retention register

of employees of the Washington office of the Office of the Solicitor, United States Department of Agriculture. Under retention Subgroup A-2 therein appeared the names of five women and three men, each one of whom was then and is now known by plaintiff to be employed on active duty for several years past in a position of Attorney, Grade P-3, in said Washington office of the Office of the Solicitor. Each one of said eight Attorneys, Grade P-3, thus assigned by Defendant to retention Subgroup A-2, is carried on the records of the Office of the Solicitor as (1) "Without veteran preference". (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service.

Each of said eight Attorneys, Grade P-3, thus in retention Subgroup A-2, has been retained in his or her position of Attorney, Grade P-3 at all times since June 6, 1947 and continues to be employed on active duty in said Washington office of the Office of the Solicitor as of September 5, 1947, the date of this Affidavit. Under retention Subgroup B-1, in such official retention register appeared the names of three men, including plaintiff, each one of whom received an identical separation notice May 29, 1947, and has been finally and completely separated in the same manner as plaintiff. Like plaintiff, each one is carried on the records of the Office of the Solicitor as (1) "With veteran preference with efficiency rating of 'Good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter.

ROBERT D. ELDER.

Subscribed and sworn to before me, a Deputy Clerk in and for the District of Columbia, this 5 day of Sept. 1947.

CHARLES E. STEWART,
Clerk.
By PAUL A. ROSES,
Deputy Clerk.

54 Filed Mar 5 1948

Order Granting Leave to File Amended and Supplemental Complaint.

Upon application of the plaintiff for leave to file an amended and supplemental complaint and no objection having been interposed by defendant, it is, by the Court this 4th day of March, 1948,

ORDERED, that the plaintiff may file and serve an amended and supplemental complaint in this action on or before the 10th day of March, 1948, and

That the defendant may, if he so desires, withdraw his motion for a summary judgment heretofore filed and directed to the original complaint.

BEN MOORE,
Justice.

Approved as to form:

ROBERT D. ELDER,
Plaintiff.

JOSEPH M. FRIEDMAN,
Counsel for Defendant.

55 Filed Mar 8 1948

Amended and Supplemental Complaint.

Suit for a Temporary and Permanent Injunction to Restrain the Defendant From Separating the Plaintiff, an Honorably Discharged Veteran of the United States, From a Position as Attorney Under the Jurisdiction of the Defendant, for a Mandatory Injunction Restoring Plaintiff's Employment and Employment Status, for a Declaratory Judgment, and for Such Other and Further Relief as to the Court May Appear Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

Plaintiff realleges Paragraphs 1 to 17 inclusive of the original complaint filed herein June 5, 1947, together with all exhibits and prayers for relief, and also realleges Paragraphs 18 to 26 inclusive of the first amended complaint filed herein June 24, 1947, together with all exhibits and prayers for relief. Plaintiff further alleges:

27. Prior to June, 1942, and during all times referred to herein, this plaintiff has been an honorably discharged soldier whose record in said Department of Agriculture is rated good or very good, and is an established preference eligible possessed of the rights granted under the Act of August 23, 1912 [c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat.
56 15; 5 U.S.C.A. 648]. All the aforesaid rights of plaintiff have been violated by the conduct of defendant complained of in this action.

28. During all times since June 27, 1944, this plaintiff has been an ex-serviceman who has served on active duty in the infantry branch of the armed forces of the United States during World War One of 1917, has been separated therefrom under honorable conditions, and has been an established preference eligible possessed of the rights granted under each and every section of the Veterans' Preference Act of June 27, 1944, [c. 287, 58 Stat. 387 to 391 inclusive, 5 U.S.C.A. 851 to 869 inclusive] and more especially has been possessed of the rights granted under Sections 2, 7, 8, 9, 12, 13, 14, 15, and 18 of said Act of 1944 [5 U.S.C.A. 851, 856, 857, 858, 861, 862, 863, 864, and 867]. During all times since August 2, 1943, this plaintiff has also been a preference employee, whose efficiency ratings have been and are "good or better", possessed of the rights granted under Section 12 of the Veterans' Preference Act of 1944 [5 U.S.C.A. 861]. All the aforesaid rights have been violated by the conduct of defendant complained of in this action.

29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Rob-

ert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans' preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of "very good", as well as assuming to perform functions and duties which plaintiff was and is capable of performing.

57

30. The mimeographed notice from the Solicitor dated May 29, 1947 (Plaintiff's Exhibit "A", Complaint), at that time informed plaintiff Elder that "lack of funds" necessitated his separation from his position effective June 30, 1947, and that his last day of active duty therein would be June 6, 1947. Notices to the same effect were at the same time delivered to many other Attorneys who were carried on the retention register of said Washington office in the so-called sub-groups A-2, B-1, and B-2. On July 3, 1947, the plaintiff and other Attorneys received from the Solicitor another mimeographed notice dated June 30, 1947, informing each of them that: "Pending approval of the 1948 Appropriation Act for the Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office." A copy of said letter of June 30, 1947, is hereto attached, marked Plaintiff's Exhibit "F". On July 25, 1947, the plaintiff received a typewritten letter dated July 24, 1947, from the Solicitor which informed him *inter alia:* "I regret to inform you that it will not be possible to rescind the separation notice issued to you. Your separation by reduction-in-force will, therefore, be effective at the close of business June 30, 1947 * * *. I wish to tell you

again how much I regret the necessity for this action and to wish you every success for your future. (Signed W. Carroll Hunter." A copy of said letter dated July 24, 1947, is hereto attached, marked Plaintiff's Exhibit "G". On July 31, 1947, the plaintiff received another short
58 transmittal letter from the Solicitor dated July 30, 1947, enclosing the formal notice dated July 25, 1947, of plaintiff's separation, which stated *inter alia*, "Effective date: June 30, 1947 c.o.b. Remarks—: Lack of funds." A copy of said letter dated July 30, 1947, is hereto attached, marked Plaintiff's Exhibit "H", and a copy of said notice dated July 25, 1947, is hereto attached, marked Plaintiff's Exhibit "I".

31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the "retention register" in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture.

32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelson, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed and believes that Congress has appropriated no ad-
59 ditional funds available for such Attorney salaries

since May 29, 1947. Prior to June 6, 1947, each of said six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: "for the duration of the war and for six months thereafter." When the retention register of the Office of the Solicitor was examined by this plaintiff between the dates May 29, 1947, and June 6, 1947, the name of the aforesaid Virginia Merrill, among others, appeared therein as an Attorney, Grade P-3, in sub-group B-2, whereas the name of this plaintiff appeared therein as an Attorney, Grade P-3, among other veterans' preference Attorneys in the supposedly superior sub-group B-1 set up by the Civil Service Retention Preference Regulations. None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served "on active duty in any branch of the armed forces of the United States during any war . . . " (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C.A. 851, 861). None of said six Attorneys has ever been an "honorably discharged soldier or sailor whose record in said department is rated good . . . " (Act of August 23, 1912, 37 Stat. 413, 5 U.S.C.A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such.

60 33. The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, sub-group B-2, while defendant excluded plaintiff therefrom, was itself in violation and attempted evasion of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944 and under Section 4 of said Act of August 23, 1912; and was also in disregard of that portion of such rights accorded by the Civil Service Retention Preference Regula-

tions [Part 20, pp. 2849-2853, Vol. 12, No. 86, Fed. Reg. of May 1, 1947], pursuant to which defendant has asserted that he conducted the alleged separation of this plaintiff, an Attorney, Grade P-3, in the superior sub-group B-1.

34. In addition to the above Attorneys, Grade P-3, in sub-group B-2, the defendant has concurrently continued in employment on active duty a considerable number of other Attorneys in Grade P-4 and higher, who are non-veterans in said sub-group B-2 and none of whom has ever been accorded permanent or classified (competitive) civil service status. One such Attorney, who is a non-veteran serving under an indefinite war-service appointment in sub-group B-2, was on May 29, 1947, and thereafter, unlawfully withheld from the prescribed operation of the Civil Service Retention Preference Regulations and has never been the recipient of a separation notice. Each of the aforesaid acts was likewise in violation of plaintiff's statutory rights and the regulations.

35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3,
61 sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, "lack of funds," asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U.S.C.A. 864), in respect of the notification and establishment of such cause and the reasons therefor.

36. The plaintiff's unsuccessful efforts to obtain rescission of his notice of separation and purported separation

by oral and written appeal to the defendant's Solicitor, followed by written appeal to the Secretary of Agriculture, are alleged in the amended complaint filed June 24, 1947. The plaintiff also filed written appeal in apt time June 5, 1947, with the United States Civil Service Commission, which appeal was denied without a hearing July 14, 1947. After further written appeal to the Commission and the granting of a personal hearing September 25, 1947, before its Board of Appeals and Review, such appeal was denied October 23, 1947, by the Board of Appeals and Review, which informed plaintiff that such denial of his appeal "has been approved by the Civil Service Commissioners." Copies of the two letters dated July 14, 1947, and October 23, 1947, embodying the decisions of the United States Civil Service Commission upon said two successive appeals are hereto attached, marked respectively Plaintiff's Exhibit "J" and Plaintiff's Exhibit "K".

62 37. There have recently become once more available to plaintiff two original letters written by the Board of Legal Examiners in Washington, D. C., and mailed to plaintiff in Denver, Colorado. A copy of said first letter, dated November 26, 1942, is hereto attached, marked Plaintiff's Exhibit "L"; and a copy of the second letter, dated February 11, 1943, is hereto attached, marked Plaintiff's Exhibit "M". Each of these two letters relates to the competitive procedures which were utilized in regard to plaintiff by the Board of Legal Examiners.

38. The competitive written examination for Attorney positions, referred to in Plaintiff's Exhibit "L", was given by the Board of Legal Examiners to plaintiff in Denver, Colorado, on September 26, 1942. Plaintiff passed this examination and was so notified by the aforesaid letter dated November 26, 1942, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (Plaintiff's Exhibit "L"), which reads in part as follows:

"Dear Mr. Elder:

"As a result of the written attorney examination which you took on September 26, you are entitled to be examined orally for a place upon the eligible register by a state examining board of the Board of Legal Examiners.

"Please appear at Judge's Chambers, Div. I, Dist. Court, Municipal Building, Denver, Colorado at 10: A.M. Tuesday, January 26, 1943. * * *"

39. The oral examination for a place on the eligible register was given to plaintiff in Denver, Colorado, January 26, 1943, at the hour and place referred to in the foregoing letter. It was held in the chambers and presence of Honorable Robert W. Steele, District Judge, on January
63 26, 1943. The plaintiff passed this oral examination and was accordingly notified by letter dated February 11, 1943, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (Plaintiff's Exhibit "M"), which reads in part as follows:

"Dear Mr. Elder:

"I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. * * *"

40. A few months after February 11, 1943, and such announced inclusion of plaintiff upon the register of 2,000 Attorney eligibles, the plaintiff was first contacted by the Office of the Solicitor, United States Department of Agriculture, with the inquiry whether plaintiff would accept a position of Attorney in its Washington office. Prior to such inquiry plaintiff had no acquaintance with any official or employee in said agency; and plaintiff never at any time prior to June, 1947, applied for employment to the defendant or to any official or employee of defendant. The aforesaid contact, inquiry, and subsequent appointment of plaintiff to his position of Associate Attorney, grade P-3, effec-

tive August 2, 1943, were made because of the certification of plaintiff's name to defendant by the United States Civil Service Commission and Board of Legal Examiners from the aforesaid register of 2,000 Attorney eligibles upon which plaintiff was included as a result of the competitive examination, written and oral, conducted by the Board of Legal Examiners, pursuant to the competitive procedure authorized by the Ramspeck Act, Executive Order 8743, and the Civil Service Regulations at that time remaining in effect. Plaintiff alleges that he was appointed to his Attorney position August 2, 1943, by reason of and pursuant to

64 Section 17.8 of the Regulations of the Board of Legal Examiners and the register of 2,000 Attorney eligibles established and administered thereunder. Said Section 17.8, "Register of Eligibles," was adopted January 30, 1943, and published February 18, 1943, in Vol. 8, No. 34 of the Federal Register, p. 2141 (8 Fed. Reg. 2141), pursuant to Executive Order No. 8743 of April 23, 1941 (6 Fed. Reg. 2117), which Executive Order 8743 was in turn pursuant to the authority of the Ramspeck Act of November 26, 1940 [54 Stat. 1211, 5 U.S.C.A. 631(a)].

41. Plaintiff has read the affidavit of Mr. W. Edward Bawcombe filed herein August 15, 1947, and his averments at pp. 1-2 that plaintiff was appointed pursuant to "special war-time procedures" under "Section 7, Regulation 1 of the Regulations of the Board of Legal Examiners." Said "Section 7, Regulation 1" was adopted March 16, 1942, and published March 24, 1942, as Section 17.2(g) in Volume 7, No. 57 of the Federal Register, p. 2201. Under its sub-head caption, to-wit: "Procedure prior to the establishment of registers" (Sec. 17.2, 7 Fed. Reg. 2201), said Section 17.2 was manifestly inapplicable to procedure after the establishment of the register of attorney eligibles upon which plaintiff was included by the Board of Legal Examiners. Said Section 17.2 was manifestly adopted for, and applicable only to, appointments made prior to the establishment of such a register of attorney eligibles.

WHEREFORE, the promises considered, the plaintiff prays:

1. That process issue from this Court commanding the defendant to answer this suit and this amended and supplemental complaint.

2. That preliminary mandatory injunction issue directing the defendant to restore plaintiff to active duty in his position of Attorney, grade P-3, forthwith.

3. That final mandatory injunction issue directing the defendant to restore plaintiff to duty in possession of and in accordance with all the rights, privileges, and benefits that plaintiff enjoyed at the time of the wrongful separation from active duty June 6, 1947, and to permit plaintiff to receive all the rights, benefits, and privileges that would normally flow from a continuity of service on active duty from the time of the wrongful separation up to and including the final order of this Court.

4. That the Court render declaratory judgment in favor of the plaintiff as previously in detail set out in the Prayer numbered "4" on page 10 of the first Amended Complaint filed herein June 24, 1947.

5. That, because of the wrongful acts of the defendant, the plaintiff have and recover against the defendant the costs of this action.

6. That the plaintiff may have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER,
Plaintiff.

C. L. DAWSON,
Attorney for Plaintiff,
917 - 15th Street, N.W.,
Washington, D. C.

ROBERT D. ELDER,
Attorney for Plaintiff,
4213 - 32nd Road South,
Arlington, Virginia.

[Notarial Certificate Omitted.]

67 Filed Mar 8 1948

Plaintiff's Exhibit "F".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

June 30, 1947

To: Mr. Robert D. Elder.
From: Solicitor.
Subject: Delay of Final Action on Separation Notice.

As indicated on the reduction-in-force notice furnished you, dated May 29, 1947, your separation may be effective on or after June 30, 1947.

Pending approval of the 1948 Appropriation Act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation; so that we may then inform you of the definite action which will be taken with respect to your employment in this office.

/s/ W. Carroll Hunter.

68 Filed Mar 8 1948

Plaintiff's Exhibit "G".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

July 24, 1947

To: Robert D. Elder
From: Solicitor.

I regret to inform you that it will not be possible to rescind the separation notice issued to you. Your separation by reduction-in-force will, therefore, be effective at the close of business June 30, 1947, and you will receive a lump-sum payment for any annual leave to your credit as of that date.

The formal notification of this action will be sent to you shortly, and payment for June 30 plus your accrued annual

leave will be forwarded to you as soon as possible. If you have not already completed a Form OS-133, please complete and return the enclosed form as soon as possible, together with any building passes, identification cards, or Government property you may have in your possession. We must have this material before the check for any salary and annual leave may be delivered to you.

I wish to tell you again how much I regret the necessity for this action and to wish you every success for your future.

(s) W. CARROLL HUNTER.

Enclosure

69 Filed Mar 8 1948

Plaintiff's Exhibit "H".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

July 30, 1947

Mr. Robert D. Elder
Leadville, Colorado

Dear Mr. Elder:

There is enclosed formal notification of your separation due to reduction in force effective June 30, 1947 c.o.b.

Sincerely yours,

/s/ W. CARROLL HUNTER,
Solicitor.

Enclosure

70 Filed Mar 8 1948

Plaintiff's Exhibit "I".

UNITED STATES DEPARTMENT OF AGRICULTURE

AD-126 REVISED
July 1945
Personnel Notification

Administration, Bureau or Office OFFICE OF THE SOLICITOR
Location Washington, D. C.

Date Jul 25, 1947

Name: Mr. Robert D. Elder.
Nature of Action: Reduction in force.

From

Position: Attorney P-3.
Grade, Salary & Position No.: P-970-3-151, $4,525.80 p.a. (Bureau No. 1061)
Bureau: Office of the Solicitor.
Branch or Div.: Production and Subsistence Division.
Headquarters: Washington, D. C.
Departmental or Field: Departmental.
Effective Date: June 30, 1947 c.o.b.
Remarks:—Employee to be paid for 584 hours annual leave which would have carried him to October 13, 1947 c.o.b.
Lack of funds.
There is no other position for which this employee has reassignment rights which is occupied by another employee subject to displacement for which this employee is qualified and willing to accept.

/s/ W. CARROLL HUNTER.
NAME OF EMPLOYMENT OFFICER

Employee's Copy

71 Filed Mar 8 1948

Plaintiff's Exhibit "J".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

July 14, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

The investigation of your appeal from separation by reduction in force from your position in the Office of the Solicitor, Department of Agriculture, has been completed.

Information obtained disclosed that you were properly reached for reduction in force action and received due written notice of your proposed separation. Since you are in a position which is excepted from the Civil Service Act and Rules, it is not mandatory that you be offered reassignment to a continuing position under Section 9 of the Retention Preference Regulations.

In view of the fact that your rights under the Retention Preference Regulations have been observed in the action taken in your case, you are advised that your appeal is denied.

Very truly yours,

/s/ JOHN A. OVERHOLT

JOHN A. OVERHOLT, *Chief*
Efficiency Ratings
Administration Section
Personnel Classification
Division

72 Filed Mar 8 1948

Plaintiff's Exhibit "K".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

October 23, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

Reference is made to your appeal, under the provisions of Section 14 of the Veterans' Preference Act of 1944, from the decision of the Commission's Personnel Classification Division, Reduction-in-Force Unit, approving your separation from the position of Attorney in the Office of the Solicitor, Department of Agriculture, in a reduction-in-force program.

The decision of the Personnel Classification Division approving the action of the Department of Agriculture in separating you was based upon a finding that you were properly placed in retention group B-1; that you were reached for separation in accordance with the Retention Preference Regulations and that you were accorded by the Department your rights under the Veterans' Preference Act and the Commission's regulations.

The Commission's Board of Appeals and Review, after a careful consideration of the facts and circumstances in your case, including the representations made by you at the hearing before this Board on September 25, 1947 and the laws and regulations applicable to your case, has found that the decision of the Personnel Classification Division was correct. The Board accordingly recommended that this decision be sustained on appeal and this recommendation has been approved by the Civil Service Commissioners.

The decision of the Commission's Personnel Classifica-

tion Division denying your appeal, therefore, has been affirmed.

By direction of the Commission:

Very respectfully,

/s/ JOHN F. EDWARDS

JOHN F. EDWARDS, *Chairman*
Board of Appeals and Review

73 Filed Mar 8 1948

Plaintiff's Exhibit "L".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Board of Legal Examiners
Department of Justice Building
Room 4726

November 26, 1942

Mr. Robert D. Elder,
310 W. 8th Street,
Leadville, Colo.

Dear Mr. Elder:

As a result of the written attorney examination which you took on September 26, you are entitled to be examined orally for a place upon the eligible register by a state examining Board of the Board of Legal Examiners.

Please appear for examination at Judge's Chambers, Div. I, Dist. Court, Municipal Building, Denver, Colorado at 10:00 A.M. Tuesday, January 26, 1943.

The examination will be largely directed to items in your professional training and experience and requires no advance preparation.

Very truly yours,

/s/ RALPH F. FUCHS

RALPH F. FUCHS,
Executive Secretary.

Reg. Bd.—4

74 Filed Mar 8 1948

Plaintiff's Exhibit "M."

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Board of Legal Examiners
Department of Justice Building
Room 4726

February 11, 1943

Mr. Robert Dull Elder
310 W. 8th Street
Leadville, Colorado

Dear Mr. Elder:

I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. Your eligibility is contingent upon the outcome of a character inquiry and is limited to one year. Although the size of the register has been determined by the probable need of the Government for attorneys, the likelihood of your receiving an offer of appointment cannot be precisely forecast.

You may be approached by more than one agency of the Government as a result of your eligibility, since the agencies must determine for themselves whether you meet the requirements of particular positions. You are, of course, free to weigh the desirability of particular positions from your own standpoint, and your rejection of an offer of a particular position will not prejudice your standing upon the register. To avoid confusion and waste, a commitment once made to a particular agency should ordinarily be adhered to.

Please keep this office informed of any change in your address or of any change in circumstances which makes you unavailable for a Government legal position. Persons entering the military service will have their status preserved;

their names will, of course, be removed from the register, but if within six months after honorable discharge they request this office to restore their names, they will be placed on a then-existing register for the same grades of positions for a period of one year.

By direction of the Board.

Very truly yours,

/s/ RALPH F. FUCHS

RALPH F. FUCHS,
Executive Secretary.

Register—1

* * * * * * * * * *

75 Filed Mar 22 1948

Motion to Strike Matter From Pleading and for Summary Judgment.

Defendant moves the Court pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, as amended, to strike from the plaintiff's complaint the following allegations, on the ground that they are immaterial to the issues herein, impertinent and prejudicial:

1. "29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans" preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of "very good", as well as assuming to perform functions and duties which plaintiff was and is capable of performing."

2. "31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the 'retention register' in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture."

3. "32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelson, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been
76 steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed and believes that Congress has appropriated no additional funds available for such Attorney salaries since May 29, 1947. Prior to June 6, 1947, each of said six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: 'for the duration of the war and for six months thereafter.' When the retention register of the Office of the Solicitor was examined by this plaintiff between the dates May 29, 1947, and June 6, 1947, the name of the aforesaid Virginia Merrill, among others, appeared therein as an Attorney, Grade P-3 in sub-group B-2, whereas the name of this plaintiff appeared therein as an attorney, grade P-3, among other veterans' preference Attorneys in the supposedly superior sub-group B-1 set up by the

Civil Service Retention Preference Regulations. None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served 'on active duty in any branch of the armed forces of the United States during any war . . .' (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C.A. 851, 861). None of said six Attorneys has ever been an 'honorably discharged soldier or sailor whose record in said department is rated good . . .' (Act of August 23, 1912, 37 Stat. 413, 5 U.S.C.A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such."

4. "33. The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, sub-group B-2, while defendant excluded plaintiff therefrom, was itself in violation and attempted evasion of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944 and under Section 4 of said Act of August 23, 1912; and was also in disregard of that portion of such rights accorded by the Civil Service Retention Preference Regulations [Part 20, pp. 2849-2853, Vol. 12, No. 86, Fed. Reg. of May 1, 1947], pursuant to which defendant has asserted that he conducted the alleged separation of this plaintiff, an Attorney, Grade P-3, in the superior sub-group B-1."

5. "35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3, sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, 'lack of funds,' asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and

is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U.S.C.A. 864), in respect of the notification and establishment of such cause and the reasons therefor."

Defendant further moves the Court upon the amended and supplemental complaint and upon the affidavits
77 of Lawson A. Moyer dated August 5, 1947 and F. Edward Bawcombe dated July 25, 1947, heretofore filed and the affidavit of F. Edward Bawcombe dated March 18, 1948, hereto annexed, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, on the ground that there are no genuine issues as to any material facts and defendant is entitled to such judgment as a matter of law and for such other and further relief as to the Court may seem just and proper.

GEORGE MORRIS FAY,
United States Attorney.

JOSEPH M. FRIEDMAN,
Assistant to the Attorney General.

LOUISE H. HUNT,
Attorney, Department of Justice.

* * * * * * * * * * *

78 Filed Mar 22 1948

Affidavit in Support of Defendant's Motion to Strike Matter From Pleading and for Summary Judgment.

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, *ss:*

W. Edward Bawcombe, being duly sworn, deposes and says:

I am the Executive Assistant to the Solicitor, Office of the Solicitor, United States Department of Agriculture. This affidavit is submitted in support of a motion to strike and

for summary judgment made by the defendant in the above entitled action.

It is the purpose of this affidavit to show the complete immateriality and irrelevancy of statements made in certain paragraphs of the amended and supplemental complaint as to certain acts of the defendant performed long after the separation of the plaintiff, and having no bearing upon or connection therewith.

The plaintiff charges that these acts were in violation of, and constituted an attempted evasion of, his allegedly superior rights, thereby imputing to the defendant bad faith in effectuating a reduction in force. This imputation is completely without foundation as this affidavit will
79 show. It is also the purpose of this affidavit to bring before the Court certain facts which more clearly show the circumstances surrounding said reduction in force.

In my capacity as Executive Assistant to the Solicitor, it was my duty to prepare the register for the reduction in force action by reason of which the plaintiff's employment as an attorney, P3, in the Office of the Solicitor was terminated. The reduction in force register was prepared and separations in accordance therewith were effected in the *bona fide* belief that funds were not, and would not be, available for payment of the salaries of the employees of the Office of the Solicitor unless a reduction was made in the number of such employees. There was not prior to, or in the course of, the preparation of said reduction in force register a preconceived intent on the part of the affiant to utilize such a procedure as the means of effecting the separation of plaintiff or any other specific employee other than as such separations might be required because of a lack of available funds for salary purposes and might be dictated by the applicable Retention Preference Regulations prescribed by the United States Civil Service Commission.

In the process of the reduction in force action as a result of which the plaintiff was separated from the rolls of the Department of Agriculture, there were a total number of

twenty attorneys in Washington whose employments were likewise terminated. The twenty attorneys, including the plaintiff, were classified for Classification Act pur-
80 poses as follows: P6, 2 attorneys, P5, 4 attorneys, P4, 8 attorneys, P3, 5 attorneys, and P2, 1 attorney. They were classified under the Retention Preference Regulations as follows: A2, 3 attorneys, B1, 6 attorneys, and B2, 11 attorneys. They included all attorneys in the Washington office in retention subgroups B1 and B2 with the exception of one attorney in subgroup B2, grade P-8, who was retained because of his special qualifications and assignment as Associate Solicitor in Charge of Litigation and Special Assistant to the Attorney General. As stated in affiant's affidavit, heretofore filed in this action in support of defendant's motion for summary judgment, and hereby reaffirmed, the aforesaid reduction in force was necessitated by a lack of funds available for employment of personnel in the said Office of the Solicitor.

Some time subsequent to the effective date of the separations under the reduction in force action there were made available in the aforesaid Office of the Solicitor funds additional to those which were available at the time of the reduction in force action and in addition to the funds specifically appropriated for the Office of the Solicitor in the Department of Agriculture Appropriation Act, 1948. The funds so received were allotted to the Office of the Solicitor from appropriations for other agencies of the Department of Agriculture and the War Assets Administration by allotments which could not be anticipated by the Office of the Solicitor at the time of the reduction in force action. The Office of the Solicitor has no control over these allotments or means of predicting their availability. Further-
81 more, by reason of the resignation and transfer from the Office of the Solicitor of several attorneys subsequent to the effective date of the separations resulting from the aforesaid reduction in force action funds which otherwise would have been required for payment of their salaries

became available to the said Office of the Solicitor for employment of other personnel. The fact that such resignations and transfers would take place was unknown to affiant at the time the reduction in force action was completed. By reason of the funds made available through the aforesaid allotments, transfers, and resignations it was possible for the Office of the Solicitor to reemploy nine attorneys, including one veteran, in Washington who had been separated through the aforesaid reduction in force action and who otherwise would not have been reemployed at the time. The first of such reemployment was effected on, to-wit, October 27, 1947. The selection of the attorneys for reemployment was made upon the basis of training and experience and their particular suitability for the positions they were to fill.

W. Edward Bawcombe.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 18th day of March, 1948.

L. M. Sampson,
Notary Public.

My commission expires Aug. 7, 1952.

* * * * * * * * * * *

82 Filed Jun 2 1948

Informal Memorandum.

It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations. Upon consideration of such facts plaintiff may not succeed.

Accordingly, the motion of defendant for summary judgment will be sustained and counsel will present an appropriate order to that end.

F. Dickinson Letts,
Justice.

* * * * * * * * * * *

83 Filed Jun 7 - 1948

Order for Substitution of Party Defendant.

Upon application of the plaintiff, and it appearing to the Court that the abovenamed Defendant, Clinton P. Anderson, has resigned from the office of Secretary of Agriculture and that Charles F. Brannan is now the duly appointed, confirmed, qualified, and acting Secretary of Agriculture, it is, by the Court, this 7th day of June, 1948,

ORDERED, that Charles F. Brannan, Secretary of Agriculture, Defendant, be substituted as the Defendant herein, and

That this cause may be continued and maintained against the said Charles F. Brannan, Secretary of Agriculture, Defendant, in all respects as formerly against his predecessor in such office, Clinton P. Anderson.

T. ALAN GOLDSBOROUGH,
Justice.

Consented to:

C. L. DAWSON,
ROBERT D. ELDER,
Counsel for Plaintiff.

JOSEPH M. FRIEDMAN,
LOUISE H. HUNT,
Counsel for Defendant.

* * * * * * * * * * *

84 Filed Jun 9 1948

Motion for Rehearing.

The plaintiff moves the Court for a rehearing upon the defendant's Motion for Summary Judgment.

Plaintiff shows that the decision of this Court granting same is in conflict and incompatible with the decision of the Supreme Court of the United States handed down the same

dated June 1, 1948, in the case of Earle W. Hilton v. John L. Sullivan, Secretary of the Navy (No. 560—October Term, 1947) on Writ of Certiorari to the Court of Appeals for the District of Columbia granted 333 U. S..... Memorandum of law herewith.

C. L. Dawson,
917 15th Street, N. W.
Washington, D. C. NA 8668

Robert D. Elder,
4233 32nd Road South
Arlington, Va. AL 2349
Attorneys for Plaintiffs.

* * * * * * * * * *

85 Filed Jun 11 1948

Order Overruling Motion for New Trial.

Upon the coming on for hearing of the motion filed herein by plaintiff, for a new trial, it is this 11th day of June, 1948, ordered that said motion be, and the same is hereby overruled.

Harry M. Hull, *Clerk.*
By Irene B. Burroughs,
Deputy Clerk.

By direction of
Justice F. Dickinson Letts.

* * * * * * * * * *

86 Filed Jun 22 1948

Order.

Upon consideration of the motion of defendant for summary judgment and to strike, the affidavits and points and authorities in support thereof, upon argument of counsel in open court and upon all the proceedings herein, and the Court being fully advised in the premises, it is by the Court this 22nd day of June 1948,

ORDERED, ADJUDGED AND DECREED that, the motion of defendant for summary judgment be, and the same hereby is, granted.

By the Court:

F. DICKINSON LETTS,
Justice.

Approved as to Form:
C. L. DAWSON,
ROBERT D. ELDER,
Attorneys for Plaintiff.

JOSEPH M. FRIEDMAN, JR.,
Special Assistant to the Attorney General.

LOUISE H. HUNT,
Attorney, Department of Justice.
Attorneys for Defendant.

87 Filed Jun 28 1948

Notice of Appeal.

Notice is hereby given this 28th day of June, 1948, that Robert D. Elder hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of June, 1948 in favor of Charles F. Brannan, Secretary of Agriculture, against said Robert D. Elder.

C. L. DAWSON,
ROBERT D. ELDER,
Attorney for
Plaintiff Robert D. Elder.

93 Filed Jun 5 1947

In the District Court of the United States
For the District of Columbia

Civil Action No. 2335

GREENE CHANDLER FURMAN, c/o Maxwell Hotel, 1927 G Street, N.W., Washington, D. C., *Plaintiff*

vs.

CLINTON P. ANDERSON, Secretary of Agriculture, Washington, D. C., *Defendant.*

Suit for a Temporary and Permanent Injunction to Compel the Retention or Reinstatement of Plaintiff, an Honorably Discharged Veteran of the United States, to a Position as Attorney Under the Jurisdiction of the Defendant, for a Declaratory Judgment, and for Such Other Relief as May be Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

1. That the plaintiff is a citizen of the United States, and resides at the Maxwell Hotel, 1927 G Street, N.W., in the City of Washington, District of Columbia, and that his permanent domicile is in the City of Shreveport, State of Louisiana.

2. That the defendant is the duly appointed, acting and qualified Secretary of the United States Department of Agriculture, and in such capacity is charged by law with the administration of all laws enacted by the Congress of the United States relating to the United States Department of Agriculture, and is specifically charged by law with the employment of all personnel, including your plaintiff, an attorney in the office of the Solicitor, under the jurisdiction of the United States Department of Agriculture.

3. That employees of the United States Department of Agriculture are required to be qualified in their
94 various employment positions according to provisions of the Civil Service Act, the rules and regula-

tions of the Civil Service Commission, and are in a classification which is generally known as the classified and unclassified civil service of the United States. That the defendant is required under the laws of the United States to fill any and all positions in the United States Department of Agriculture falling within the classified and unclassified civil service from persons who have been found to be duly qualified for such positions by the United States Civil Service Commission.

4. That the plaintiff was a Reserve Officer of the United States Army from 1930 to May 1942. That on January 27, 1942, he was ordered on active duty in the grade of First Lieutenant. That on February 26, 1942, by reason of physical disqualification, he was relieved from active duty. That on May 5, 1942, he was honorably discharged because of physical disability.

5. That he has had 12 years practice of law prior to employment by the Office of the Solicitor, United States Department of Agriculture, appearing before all of the State and Federal Courts of the State of Louisiana and the United States Circuit Court of Appeals for the Fifth Circuit; that he has the academic degrees of LL.B and LL.M in law; that he took the Federal Civil Service Legal Examination given by the United States Civil Service Commission in September 1942, and was one among approximately 2,000 lawyers out of approximately 14,000 taking the examination in the United States who qualified thereunder and whose name was placed on the Civil Service Register of attorney eligibles.

6. That on or about July 26, 1943, plaintiff was employed as Attorney, grade P-3, in the Office of the Solicitor, United States Department of Agriculture, and has continued in this position and grade until the present time.

7. That plaintiff has established Veteran's Preference under the laws of the United States and the rules and regulations of the United States Civil Service Commission and the United States Department of Agriculture,
95 and is a preference eligible employed in the Office of the Solicitor, United States Department of Agricul-

ture and has completed his probationary or trial period. That on or about May 1, 1947, there was delivered to the plaintiff a notice of "Conversion to Excepted Appointment (Schedule A-1-4)", which notice is attached hereto and by reference made a part hereof. Plaintiff has attempted to discover the meaning of this conversion but has been unable to do so. He has, however, heard that all attorneys in the Office of the Solicitor, United States Department of Agriculture, were placed in this group and that by so doing the previous designations of war service appointee and permanent or career appointees were abolished, and that all attorneys in the Office of the Solicitor, United States Department of Agriculture, are competing regardless of their former status on an equal basis the veteran preference eligibles having preference over all non-veteran attorneys, otherwise seniority being determined by length of service. Plaintiff can find no authority for this statement but as it is a common report he alleges said facts to be true to the best of his information, knowledge and belief.

8. That plaintiff has been continuously employed as an attorney in the Office of the Solicitor, United States Department of Agriculture for four years less approximately two months and that all of his efficiency ratings have been good or better.

9. That at approximately 5:30 P.M. on May 29, 1947, plaintiff received a notice of discharge or separation, a portion of which reads as follows:

May 29, 1947

"Retention Subgroup of employee—B-1.

"To: Greene C. Furman.

"From: Solicitor.

"Subject: Notice To Employee Affected by Reduction in Force.

"A reduction in force brought about by Lack of Funds necessitates your being separated, effective on or after ..... Your last day of active duty in your present position will be on Jun 5 1947 c.o.b."

96 The alleged separation notice being signed "W. Carroll Hunter." Said notice is attached hereto and by reference made a part hereof. On June 2, 1947, the following business day, plaintiff wrote a letter to the said W. Carroll Hunter denying the legality of the notice hereinabove mentioned and requesting that same be revoked, a copy of which letter is attached hereto and by reference made a part hereof. To this letter the said W. Carroll Hunter replied in a memorandum dated June 2, 1947, denying plaintiff's request, the original of which reply is attached hereto and by reference made a part hereof.

10. That the provisions of the Veterans' Preference Act of 1944 provides among other things as follows:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, . . ." Title 5, U.S.C.A. 863.

11. The plaintiff alleges that now and during all of the time that he has been employed under the jurisdiction of the defendant as hereinabove alleged that he is entitled to all the rights, benefits, and privileges of the Civil Service Act, its various amendments, the Act of August 23, 1912, 5

U.S.C.A. 648 and the provisions of the Veterans Preference Act of June 27, 1944, and that the provisions of said Acts are binding on the part of said defendant.

12. The plaintiff alleges that the notice given to the plaintiff as alleged in paragraph 9 hereof is not a good or sufficient notice to meet the requirements of the statute
97 of such cases made and provided as pleaded in part and that unless this defendant is restrained by this Court that he will wrongfully and illegally separate the plaintiff from government service, and that the plaintiff has no speedy, adequate, remedy at law.

13. Plaintiff alleges that a controversy exists between the plaintiff and the defendant and defendant's agents over the legality of the separation notice herein complained of and that plaintiff is entitled to a declaratory judgment declaring said alleged separation notice a nullity and of no force and effect whatsoever, and a judgment continuing plaintiff in his present employment in an active status as a P-3 Attorney in the Office of the Solicitor, United States Department of Agriculture.

14. Plaintiff further alleges that he has been informed and therefore avers that the separation register and the retention register of the attorneys of the Office of the Solicitor of the United States Department of Agriculture has been wrongfully and/or illegally set up contrary to law and regulations in a number of particulars. First, that certain persons have been wrongfully and/or illegally protected from separation. Second, that certain persons have been given a type of status to which they are not entitled by law thus protecting them from the separation procedure complained of. Third, that the competitive levels and areas of competition have been improperly determined. Fourth, that there are positions which the plaintiff is capable and qualified under the law and regulations to fill and that for these positions he has department wide preference both in the Washington Office and in the field which have not been exercised in his behalf. That on June 4, 1947, plaintiff made

amicable demand in writing on Mrs. Pauline C. Wood, Chief, Personnel Section, Office of the Solicitor, United States Department of Agriculture, to see said separation and retention registers, a copy of which amicable demand is attached hereto and by reference made a part hereof. Said demand has thus far been orally refused but plaintiff has been told that the request has been referred to a higher authority. Plaintiff was allowed to examine the registers of the P-3s in the Washington, D. C. Office.

98

That plaintiff believes and therefore avers that these improper registers and their application to plaintiff's case may have resulted in your plaintiff's receiving the aforementioned illegal notice of separation.

15. Plaintiff alleges that a controversy exists between the plaintiff and the defendant and the defendant's agents over the legality and correctness of the separation and retention registers of the attorneys in the Office of the Solicitor, United States Department of Agriculture, as hereinabove set forth and that plaintiff is entitled to a declaratory judgment declaring the wrongful and illegal method in which the separation and retention registers of the Office of the Solicitor, United States Department of Agriculture, have been set up and setting aside said separation and retention registers insofar as they improperly affect the plaintiff's retention in his employment.

16. That on June 4, 1947, plaintiff wrote a memorandum to the aforementioned W. Carroll Hunter as result of his reply to plaintiff's first letter of June 2, 1947, and certain oral conversations with the said W. Carroll Hunter. A copy of the said memorandum of June 4, 1947, is attached hereto and by reference made a part hereof. That plaintiff has thus far received no reply to said letter of June 4, 1947.

WHEREFORE the plaintiff prays:

1. That due process of this Court issue directing and commanding the defendant to appear and answer this bill of complaint.

2. That this Court issue a temporary injunction restraining said defendant, his agents, and officials from separating the plaintiff from active duty in and from his position as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, at least until such a time as this Court shall determine the issues involved in this litigation and that the Court on final hearing order that the temporary injunction be made permanent.

99 3. That there be a declaratory judgment in plaintiff's favor declaring the separation notice set forth and complained of in this complaint a nullity and of no force and effect whatsoever, and that there be judgment continuing plaintiff in his present employment in an active status as a P-3 Attorney, in the Office of the Solicitor, United States Department of Agriculture.

4. That there be a declaratory judgment in plaintiff's favor declaring the wrongful and illegal nature of the separation and retention registers of the Office of the Solicitor, United States Department of Agriculture, insofar as this Court may determine and declaring the nullity of said separation and retention registers insofar as they illegally and/or wrongfully affect the plaintiff's retention in his active employment.

5. That because of the illegal and unlawful acts of the defendant, the plaintiff have, and recover against the defendant personally, the costs of this action.

6. That the plaintiff have such other and further relief as to the Court may appear to be equitable and just.

GREENE CHANDLER FURMAN,
Plaintiff.

C. L. DAWSON,
Attorney for the Plaintiff,
917 18th Street, N.W.,
Washington, D. C.

[Notarial Certificate omitted.]

• • • • • • • • • • •

[Exhibits attached to Complaint in C. A. No. 2335-47 omitted, since they are similar to exhibits of Plaintiff Robert D. Elder.]

• • • • • • • • • • •

112 Filed Jun 28 1948

Notice of Appeal.

Notice is hereby given this 28th day of June, 1948, that Greene Chandler Furman hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of June, 1948 in favor of Charles F. Brannan, Secretary of Agriculture, against said Greene Chandler Furman.

C. L. DAWSON,
ROBERT D. ELDER,
Attorney for
Plaintiff Greene Chandler
Furman.

• • • • • • • • • • •

113 Filed Jun 28 1948

Designation of Consolidated Record on Appeal and Stipulation Pursuant to Rule 12 (c) of the Court of Appeals of the District of Columbia.

Each of the above-named plaintiffs and defendant designates the following portions of the record of proceedings and evidence to be contained in the consolidated record on appeal:

1. Complaint filed June 5, 1947 by Robert D. Elder in Civil Action No. 2336-47, with attached Exhibits "A", "B", and "C".

2. Amended Complaint filed June 24, 1947 in Civil Action No. 2336-47, with attached Exhibits "D" and "E".

3. Defendant's Motion for Summary Judgment filed August 15, 1947 in Civil Action No. 2336-47, with attached affidavits and exhibits in support.

4. Affidavit of Robert D. Elder filed September 5, 1947 in Civil Action No. 2336-47 in opposition to defendant's Motion for Summary Judgment.

5. Order dated March 5, 1948 granting leave to file Amended and Supplemental Complaint.

6. Amended and Supplemental Complaint filed March 8, 1948 in Civil Action No. 2336-47, with attached Exhibits "F", "G", "H", "I", "J", "K", "L", and "M".

114 7. Defendant's Motion to Strike matter from pleading and for Summary Judgment filed March 22, 1948 in Civil Action No. 2336-47, with annexed affidavit of W. Edward Bawcombe dated March 18, 1948 in support.

8. Informal Memorandum by Mr. Justice F. Dickinson Letts filed June 2, 1948 in Civil Action No. 2336-47, sustaining defendant's Motion for Summary Judgment.

9. Order for Substitution of Party Defendant filed June 7, 1948 in Civil Action No. 2336-47.

10. Motion for rehearing filed June 9, 1948.

11. Order dated June 11, 1948 denying Motion for rehearing.

12. Order, judgment, and Decree filed June 21, 1948 in Civil Action No. 2336-47, granting defendant's Motion for Summary Judgment.

13. Notice of Appeal by Robert D. Elder in Civil Action No. 2336-47.

14. Complaint filed June 5, 1947 by Greene Chandler Furman in Civil Action No. 2335-47.

15. Notice of Appeal by Greene Chandler Furman in Civil Action No. 2335-47.

16. This Designation of Consolidated Record on Appeal and Stipulation pursuant to Rule 12 (c) of the Court of Appeals for the District of Columbia.

Stipulation.

Since these are appeals from judgments in two cases consolidated for hearing in the District Court, compliance is required with Rule 12 (c) of the United States Court of Appeals for the District of Columbia. It is accordingly

stipulated and agreed upon by all parties to the appeals, solely for the purpose of such appeals:

That the material facts in each of the above cases are substantially identical and involve identical questions of law.

That each of the filings above designated under paragraphs numbered "1" to "13" inclusive, is a substantial duplication of a corresponding filing of the same description and substance filed on the same date in Civil Action No. 2335-47, which case the District Court consolidated for hearing with the aforesaid Civil Action No. 2336-47. That the matters set up and alleged on the part of the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters set up and alleged on
115 the part of the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47. That the matters set up and averred on the part of the defendant with respect to the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters set up and averred on the part of said defendant with respect to the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47. That the matters stated, considered, and determined by the District Court with respect to the defendant and to the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters stated, considered, and determined by the District Court with respect to the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47.

C. L. Dawson,
917 15th Street, N.W.,
Washington, D. C. NA 8668
Robert D. Elder,
4233 32nd Road South,
Arlington, Va. AL 2349

Attorneys for Plaintiffs.

Joseph M. Friedman,
Louise H. Hunt,
Attorneys for Defendant.

Wednesday, December 7, 1949

* * * * *

No. 10007, April Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008, April Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Before HONORABLE WILBUR K. MILLER, E. BARRETT PRETTYMAN and DAVID L. BAZELON, Circuit Judges

* * * * *

On motion of Mr. Claude L. Dawson, Mr. Robert D. Elder of the Bar of the Supreme Court of Colorado was permitted to argue for appellants pro hac vice by special leave of Court.

On motion of Mr. Edward H. Hickey, Mr. Eugene T. Maher of the Bar of the Court of Appeals of the State of New York was permitted to argue for appellee pro hac vice by special leave of Court.

Argument commenced by Mr. Robert D. Elder for appellants, continued by Mr. Eugene T. Maher for appellee, concluded by Mr. Elder. Appellee granted leave to submit by December 12, 1949, memorandum on "Competitive Status."

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 15, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeal from the United States District Court for the District of Columbia

Argued December 7, 1949 Decided June 15, 1950

Mr. Robert D. Elder, of the Bar of the Supreme Court of Colorado, *pro hac vice*, by special leave of Court, with whom *Mr. Claude L. Dawson* was on the brief, for appellants.

Mr. Eugene T. Maher, Attorney, Department of Justice, of the Bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Assistant Attorney General Morison* and *Messrs. George Morris Fay*, United States Attorney, and *Edward H. Hickey*, Special Assistant to the Attorney General, were on the brief, for appellee.

Messrs. Charles Fahy and *Philip Levy* filed a brief on March 26, 1949, as amicus curiae for National Association of Federal Career Employees, urging affirmance.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

WILBUR K. MILLER, Circuit Judge: The appellant, Robert D. Elder, was honorably discharged from the United States Army after active service in World War I.[1] He passed a competitive civil serv-

[1] There are two appeals here. Elder is the appellant in case No. 10007 and Greene Chandler Furman is the appellant in case No. 10008. These men filed separate independent suits in the District

ice legal examination in September, 1942, and on August 1, 1943, was employed as an attorney in the Department of Agriculture. Although he had had at all times an efficiency rating of "good" or better, he was notified on May 29, 1947, that, as a part of a reduction in force made necessary by lack of funds, he would be dismissed as of June 30, 1947. He sued on June 5, 1947, to enjoin the Secretary of Agriculture from discharging him, claiming the right to be retained because of the statutory preference given to veterans. After his dismissal he continued his effort, by amended and supplemental complaint, to obtain an adjudication that he had been wrongfully discharged and should be reinstated. The Secretary moved for summary judgment, with respect to which affidavits were filed by both sides. The District Court in granting the motion said:

> "It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations. Upon consideration of such facts plaintiff may not succeed."

Elder appeals. He claims that by passing a competitive civil service legal examination and by serving a probationary period of one year, he attained a classified civil service status and that under statutory provisions [2] he had an absolute right not to be discharged, dropped or reduced in rank or salary in the event of a reduction in force. He further maintains that, even if he had not acquired classified civil service status, he had under these statutes a preference in retention and reinstatement which had been violated.

The Secretary replies that appellant was a war service appointee whose tenure was limited to the duration of World War II and six months thereafter, and that he had not attained the classified civil service status he claims. He asserts that Elder was properly classified in group B-1 under the Civil Service Commission regulations governing the retention preference of veterans in a reduction in force,[3] that those regulations are valid under § 12 of the Veterans'

Court but, because they involved substantially identical facts and presented identical questions of law, the cases were consolidated and heard together in the District Court and were briefed and argued as one before us. This opinion applies in its entirety to Furman's case as well as to Elder's.

[2] The proviso of § 4 of the Act of August 23, 1912, 37 STAT. 413, ch. 350, § 4, 5 U. S. C. A. § 648; Veterans' Preference Act of 1944, and especially §§ 2, 12, 14 and 18 thereof, 58 STAT. 387, ch. 287, 5 U. S. C. A. §§ 851, 861, 863 and 867.

[3] See footnote 4.

Preference Act of 1944 and that the appellant's dismissal was in accord with the regulations. The Secretary claims the proviso of § 4 of the Act of 1912 does not apply to war service appointees.

The first question then is whether Elder had reached or become entitled to classified (competitive) civil service status.

Executive Order No. 9063, issued February 16, 1942 (3 Code Fed. Regs., Cum. Supp. 1943, 1091), authorized the Civil Service Commission to adopt such special procedures and regulations as it might deem necessary to avoid delay in recruiting employees during the war emergency. The President expressly provided, however, that persons appointed under such special procedures to positions subject to the Civil Service Act and the Commission's rules should not thereby acquire a classified (competitive) civil service status, but, in the Commission's discretion, might be retained for the duration of the war and six months thereafter.

Pursuant to this Executive Order, the Civil Service Commission prepared and adopted the War Service Regulations effective March 16, 1942 (5 Code Fed. Regs., § 18.3, Cum. Supp. 1943), setting up special procedures of the sort and for the purpose contemplated by the Order. The subsequent appointment of attorneys was governed by the regulations of the Board of Legal Examiners of the Civil Service Commission, which contained the following (5 Code Fed. Regs. § 17.1, Cum. Supp. 1943):

> "(g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointment shall be effected under Executive Order No. 9063 of February 16, 1942, (Title 3, *supra*), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these regulations. This paragraph shall become effective March 16, 1942."

Since the foregoing was the regulation in effect at the time the appellant was appointed, his acceptance of employment necessarily was subject to the terms thereof. Nothing occurred later to change the nature of his status or tenure. It follows that throughout the period of his employment he was a war service appointee with tenure limited

to the duration of the war and a period of six months thereafter, entitled to the preference given by law to veterans in that status.

Elder's preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status. But he has preference under the Veterans' Preference Act of 1944, and particularly under §§ 2 and 12. The latter provides that

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: . . . *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees . . ."

We held in *Hilton* v. *Forrestal*, 83 U. S. App. D. C. 44, 165 F. (2d) 251 (1947), that the term "competing employees" used in § 12 of the Act refers to employees competing within the bounds of such classifications as the Commission might establish by regulations. The Civil Service Commission promulgated on May 1, 1947, retention preference regulations for use in reductions in force which set up classifications for the grouping of employees so that those classified in each group would be regarded as "competing" with one another. Those classifications and the subgroups into which they were divided, which are reproduced below,[4] were approved by us in the *Hilton* case.

---

[4] 5 Code Fed. Regs. § 20.3, Supp. 1947.

"§ 20.3. *Retention preference*—(a) *Classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

"*Group A*: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the

We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 334 U. S. 323 (1948), as holding to the contrary. It results that, since the appellant was a war service appointee with an efficiency rating not less than "good", he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service appointees whenever a reduction in force became necessary.

The record does not clearly show that any war service appointee of Elder's grade or lower, with a classification for retention preference inferior to subgroup B-1, was retained when he was discharged, so it does not appear that his preferential right to be retained was directly violated. We note, however, that appellant's preference as a member of subgroup B-1 is not limited to the right to be *retained* over competing employees in lower subgroups when reductions in force occur; by express congressional enactment his preference

---

Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

* * * * *

"A-1 Plus during one-year period after return to duty, as required by law.

"A-1 With veteran preference unless efficiency rating is less than 'Good.'

"A-2 Without veteran preference unless efficiency rating is less than 'Good.'

"A-3 With veteran preference where efficiency rating is less than 'Good.'

"A-4 Without veteran preference where efficiency rating is less than 'Good.'

"*Group B*: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

* * * * *

"B-1 With veteran preference unless efficiency rating is less than 'Good.'

"B-2 Without veteran preference unless efficiency rating is less than 'Good.'

"B-3 With veteran preference where efficiency rating is less than 'Good.'

"B-4 Without veteran preference where efficiency rating is less than 'Good.'

"*Group C*: All employees serving under appointments specifically limited to one year or less, all non-citizen employees

extends also to reinstatement and re-employment. For § 2 of the Act of 1944 provides:

> "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; . . . preference shall be given to . . . (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, . . . and have been separated therefrom under honorable conditions; . . ."

Elder's rights under this section of the statute were violated if he was denied reinstatement or re-employment when other attorneys, classified in a lower subgroup than B-1, who had been released with him, were re-employed. He alleges that this happened. He pleads that soon after the reduction in force said to have been due to lack of funds, certain attorneys of the same grade as his, but who were in a lower classification under the regulations for retention, were reinstated or re-employed as attorneys in the office of the Solicitor for the Department of Agriculture, but that he was denied re-employment. The complaint gives the names of six attorneys of the lower retention subgroup B-2 so re-employed in preference to the appellant.[5]

---

serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

* * * * *

"C-1 With veteran preference unless efficiency rating is less than 'Good.'

"C-2 Without veteran preference unless efficiency rating is less than 'Good.'

"C-3 With veteran preference where efficiency rating is less than 'Good.'

"C-4 Without veteran preference where efficiency rating is less than 'Good.'"

[5] These paragraphs from appellant's amended and supplemental complaint contain the allegations to which we refer:

"29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the

These allegations, which charge wrongful discrimination against Elder in the reinstatement of non-veterans in October, 1947, were not denied by the Secretary and nothing in the affidavits which he filed tends to contradict them. There was, therefore, no genuine issue concerning the material fact that Elder's right to preference in re-employment had thereby been denied him. So, on the record presented to him, the trial judge erred in granting summary judgment to the Secretary of Agriculture; to the contrary, the appellant was entitled to summary judgment in the state of the pleadings.

We note, however, that appellee's motion for summary judgment apparently was based on his mistaken idea that the only question in

---

Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans' preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of 'very good', as well as assuming to perform functions and duties which plaintiff was and is capable of performing.

* * * * *

"31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the 'retention register' in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture.

"32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelsen, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed, and believes that Congress has appropriated no additional funds available for such Attorney salaries since May 29, 1947. Prior to June 6, 1947, each of said

the case was whether Elder's discharge was lawful. The appellee seems to have overlooked the appellant's charge of discriminatory re-employment, for he did not deny the charge nor treat with it in the affidavits which he filed. The trial judge also failed to consider the undenied allegations concerning discrimination in re-employment, else he would not have awarded summary judgment to the appellee. It is possible that, upon remand, the Secretary may be able to raise an issue of fact concerning the alleged discrimination against Elder in the re-employment of attorneys. *Fountain* v. *Filson*, 336 U. S. 681 (1949), seems to indicate that he should be given an opportunity to do so. The judgments are reversed and the cases will be remanded. If the record remains as it is, the District Court should enter summary judgments to the effect that on October 27, 1947, both appellants were wrongfully denied reinstatement. But if the Secretary of Agriculture denies the allegations of discrimination against the appellants in re-employment, the District Court will, of course, proceed to determine the issue of fact thereby created.

Reversed and remanded.

---

six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: 'for the duration of the war and for six months thereafter.' . . . None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served 'on active duty in any branch of the armed forces of the United States during any war . . .' (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. A. 851, 861). None of said six Attorneys has ever been an 'honorably discharged soldier or sailor whose record in said department is rated good . . .' (Act of August 23, 1912, 37 Stat. 413, 5 U. S. C. A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such.

* * * * *

"34. In addition to the above Attorneys, Grade P-3, in sub-group B-2, the defendant has concurrently continued in employment on active duty a considerable number of other Attorneys in Grade P-4 and higher, who are non-veterans in said sub-group B-2 and none of whom has ever been accorded permanent or classified (competitive) civil service status. One such Attorney, who is a non-veteran serving under an indefinite war-service appointment in sub-group B-2, was on

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 15, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10,007, April Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10,008, April Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and were argued by counsel.

May 29, 1947, and thereafter, unlawfully withheld from the prescribed operation of the Civil Service Retention Preference Regulations and has never been the recipient of a separation notice. Each of the aforesaid acts was likewise in violation of plaintiff's statutory rights and the regulations.

"35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3, sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, 'lack of funds,' asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U. S. C. A. 864), in respect of the notification and establishment of such cause and the reasons therefor."

On consideration whereof, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, reversed, and that these causes be, and they are hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

Per Circuit Judge WILBUR K. MILLER.

Dated: June 15, 1950.

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 30, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

PETITION FOR REHEARING

Comes now the appellee and respectfully petitions this honorable Court that it grant a rehearing in each of the above-entitled cases and in support of said petition respectfully shows and alleges:

1. In its opinion in these cases, this Court held that appellants' amended and supplemental complaints alleged violations of appellants' preference as veterans to reemployment in the Office of the Solicitor of the Department of Agriculture. This preference to reemployment the Court found to be given by Section 2 of the Veterans Preference Act of 1944[1] So construed, the section is said to give appellants, as veterans, a preference to reemployment that is identical to the preference to retention in the service set forth in Section 12 of the statute.[2]

---

[1] 5 U. S. C. Sec. 851.

[2] 5 U. S. C. Sec. 861.

Prior to the decision of this Court the pleadings in these cases had never been considered to present the issue of appellants' reemployment rights or preferences. Neither in the court below nor in this Court did the parties argue or brief this question. The sole contention urged by appellants throughout the litigation of these cases related to the alleged violation of their rights to retention in the positions from which they were respectively separated in a reduction in force on June 30, 1947.

We respectfully suggest that the Court's construction of Section 2 of the Veterans Preference Act of 1944 is not in harmony with the other provisions of that statute and the regulations of the Civil Service Commission issued pursuant thereto.[3] Section 2 of the statute merely states that "a preference" shall be extended to veterans and proceeds to enumerate the situations in which the preference will be given and the classes of veterans who will be entitled to it. The remaining sections of the statute define the preference provided for the various situations enumerated in Section 2.

Thus, as this Court held, appellants' preference to retention is defined by Section 12 of the Act, and not by Section 2. In Sections 15, 7, 8, and 9[4] the Act provides in detail for a preference to veterans for reemployment which is not the same or the equivalent of the preference to retention in employment which is granted by the provisions of Section 12 of the statute.

In *Hilton* v. *Forrestal*, 165 F. (2d) 251, aff'd. 334 U. S. 323, this Court held valid Civil Service Commission regulations under Section 12 of the statute by which veterans are given an absolute preference for retention over competing non-veterans within the classification established by the regulations. In general, the preference to reemployment conferred by Sections 15, 7, 8, and 9 of the Act requires only that veteran applicants be rated individually with competing nonveterans, veteran status being assigned a numerical value. Appellants' pleadings fail to allege a violation of this preference and appellants are in fact unable to make such allegations since appellee fully accorded them the preference established by these sections of the statute and regulations. (Affidavit of Bawcombe, J. A. 69-72.)

Appellee does not believe that this Court contemplated a construction of the statute which does violence to its plain terms, or that it intended to invalidate clearly reasonable regulations of the Civil Service Commission, all without briefing or argument by the parties and without discussion or mention in its opinion. This, however, is the effect of the Court's ruling in these cases.

---

[3] 5 C. F. R. 1947 Supp., Sec. 21.6 (b).

[4] 5 U. S. C. Secs. 856, 857, 858, 864.

2. If the Court is of the view that the record is not sufficiently clear as to this question, however, and if a rehearing is not desired, it is respectfully requested that the Court modify its opinion to direct the receipt of proof by the lower court on the issue of appellee's compliance with the provisions of Sections 15, 7, 8, and 9 of the Veterans Preference Act of 1944 and the applicable regulations of the Civil Service Commission, and that the Court's mandate be shaped accordingly.

Respectfully submitted.

NEWELL A. CLAPP,
Acting Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
EDWARD H. HICKEY,
Attorney, Department of Justice.

Of Counsel:

EUGENE T. MAHER,
Attorney, Department of Justice.

CERTIFICATE

Edward H. Hickey, attorney for appellee, hereby certifies that this petition for rehearing is presented in good faith and not for purposes of delay.

EDWARD H. HICKEY,
Attorney, Department of Justice,
Attorney for Appellee.

CERTIFICATE OF SERVICE

I hereby certify this 30th day of June, 1950, that I have sent a copy of appellee's foregoing petition for rehearing to counsel for appellants, Claude L. Dawson, Esq., at his address, 917 15th Street, N.W., Washington, D. C., by official United States mail.

EDWARD H. HICKEY,
Attorney for Appellee.

United States Court of Appeals for the District of Columbia Circuit

No. 10007, October Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE.

No. 10008, October Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE.

Before: WILBUR K. MILLER, PRETTYMAN and BAZELON, JJ.

ORDER

On consideration of the appellee's petition for rehearing of the appeals herein, and of the appellants' petition for modification of the opinion and judgment herein, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied, and that the petition for modification of the opinion and judgment be, and it is hereby, denied.

Per Curiam.

Dated: October 2, 1950.

United States Court of Appeals for the District of Columbia Circuit, Filed October 2, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 7, 1950. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 10007, 10008

ROBERT D. ELDER, GREENE CHANDLER FURMAN, APPELLANTS,

v.

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE, APPELLEE

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of

the United States in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. Petition for rehearing.
6. Order denying petition for rehearing.
7. This designation.
8. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

November 6, 1950.

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing designation of record have been mailed to the following:

C. L. Dawson, 917 15th St., N. W., Washington 5, D. C.

Robert D. Elder, 4233 32nd Road South, Arlington, Virginia, pro se.

Attorney pro se.

PHILIP B. PERLMAN,
Solicitor General.

November 6, 1950.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered from 1 to 101, both inclusive, constitute a true copy of the joint appendix, and of the pleadings and proceedings of the said Court of Appeals as designated by counsel in the cases of: Robert D. Elder, Appellant, v. Charles F. Brannan, Secretary of Agriculture, Appellee, Greene Chandler Furman, Appellant, v. Charles F. Brannan, Secretary of Agriculture, Appellee, Nos. 10007 and 10008, October Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twentieth day of November, A. D. 1950. Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit. (Seal.)

In the Supreme Court of the United States

October Term, 1950

No. ———

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER, GREENE CHANDLER FURMAN, RESPONDENTS

STIPULATION

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

(a) Joint appendix
(b) Minute entry of argument
(c) Opinion
(d) Judgment
(e) Petition for rehearing
(f) Order denying petition for rehearing
(g) Designation of Record
(h) Clerk's certificate

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court of the United States the entire transcript of record, and it is agreed that the parties hereto may refer in their briefs to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General
Counsel for Petitioner.

———

Counsel for respondents.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 919384 375

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted.]

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Petition for modification of opinion and judgment

Filed June 30, 1950

Now come the appellants by their counsel, and, upon the grounds herewith presented, petition this Honorable Court to modify its opinion rendered June 15, 1950, and the respective judgments pursuant thereto, in the indicated particulars:

By striking out the thirty-four lines relating to veterans' retention preference appearing on pages 3 and 4 of the printed slip Opinion [viz "Elder's preference does not arise * * * it does not appear that his preferential right to be retained was directly violated."]; and by amending same in accordance with undenied allegations in the record and the principles applicable thereto.

1. This Court correctly held (Opinion, 3) that

Elder has veterans' preference under the Veterans' Preference Act of 1944, and particularly under §§ 2 and 12. The latter provides that

"In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

2. This Court erred in misquoting, misapplying, and failing to hold in accordance with the holding of this Court in Hilton v. Forrestal.

In Hilton v. Forrestal, 83 U. S. App. D. C. 44, 165 F. (2d) 251, 253, this Court held that

"*The proviso in Section 12 is that preference employees shall be retained in preference to all other 'competing' employees.* We think that refers to employees competing within the bounds of such classifications as the Commission may establish by regulations *giving 'due effect' to the four factors named.* [Emphasis of omitted portions added.]

This Court thus held that the proviso in Section 12 is that preference employees shall be retained in preference to all other employees competing within the bounds of such classifications as the Commission might establish by regulations giving "due effect" to the four factors of tenure of employment, military preference, length of service and efficiency ratings.

Such holding and interpretation is in harmony with the settled rule which requires the determination herein that the applicable proviso in § 12 was intended by Congress to take the special class of veterans' preference employees, whose efficiency ratings are "good" or better, *out of the operation of the section 12 in which it is found*, and to withdraw and except said special class of veterans' preference employees, whose efficiency ratings are "good" or better, *from the operation and operative effect of the general terms* of the first clause of § 12 *which authorize and require that "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings.*" McDonald v. United States, 279 U. S. 12, 20–21; United States v. McElwain, 272 U. S. 633; United States v. Morrow, 266 U. S. 531, 534–535; Cox v. Hart, 260 U. S. 427, 435; Schlemmer v. Buffalo R. & Ry. Co., 205 U. S. 1, 10; White v. United States, 191 U. S. 545, 551; Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 242–246; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 181; Minis v. United States, 15 Pet. 423, 445. See, also, the decision of this Court in United States ex rel. Bride v. MacFarland, 18 App. D. C. 120, 126.

The language employed by the Supreme Court, in applying this well-established rule in several of the cases above cited, follows herewith.

"As a general rule, a proviso is intended to take a special class of cases out of the operation of the body of the section in which it is found (cit. cases). But a proviso is not always limited in its effect to the part of the enactment in which it is found; it may

apply generally to all cases within the meaning of the language used." McDonald v. United States, 279 U. S. 12, 20.

"The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or to restrain the generality, of the substantive enactment to which it is attached. Cox v. Hart, 260 U. S. 427, 435.

"The general office of a proviso is to except something from the enacting clause, or to qualify and restrain this generality and to prevent misinterpretation." United States v. Morrow, 266 U. S. 531, 534.

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or *to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview.*" Potomac Tel. Co. v. Manning, 186 U. S. 238, 242.

"The general rule of law is that a proviso carves special exceptions only out of the body of the act." Schlemmer v. Buffalo, R. & Ry. Co., 205 U. S. 1, 10.

"The purpose of the added proviso was to carve out a special class of cases." United States v. McElwain, 272 U. S. 633.

There is consequently no escape from the conclusion that Elder's preferential right to be retained in his position of Attorney, Grade P–3, is independent of and not affected by his own tenure of employment or that of any other competing employees who are without veterans' preference. His right to be retained is not subject to that factor of tenure of employment, and is not in any way conditioned upon tenure of employment except as between Elder and some other veteran who has permanent tenure. For the same reason Elder's preferential right to be retained is not subject to or conditioned upon the factor of length of service as between such veteran and nonveterans. Cf. Hilton v. Sullivan, 334 U. S. 323, 335, where the factor of length of service was alone involved, and tenure of employment was not, since the controversy was resolved as between veterans and nonveterans of the same permanent tenure of employment.

3. This Court erred in failing clearly to hold that—

Undenied allegations in the record clearly show that Elder is an honorably discharged ex-serviceman who served on active service in the infantry branch of the armed forces of the United States during World War I (R. 50, 3) within the provisions of § 2 of the 1944 Act commanding that preference shall be given to such veterans in retention, as well as reinstatement and reemployment, in civilian positions, classified or unclassified. These undenied allegations also clearly show that Elder had at all times an efficiency rating of "good" or better in his civilian position

of Attorney, Grade P–3 (R. 50, 3) within the provisions of § 12 of the 1944 Act commanding that preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees.

4. This Court erred in failing to consider undenied allegations in the record (R. 47–48) showing that—

"A few days after May 29, 1947, the plaintiff examined and made penciled memoranda of the names and of the assigned 'retention Subgroups' as assigned to Attorneys, Grade P–3, set out in the official retention register of employees in the Washington office of the Office of the Solicitor, United States Department of Agriculture. Under retention Subgroup A–2 therein appeared the names of five women and three men, each one of whom was then and is now known by plaintiff to be employed on active duty for several years past in a position of Attorney, Grade P–3, in said Washington office of the Office of the Solicitor. Each one of said eight Attorneys, Grade P–3, thus assigned by defendant to retention Subgroup A–2, is carried on the records of the Office of the Solicitor as (1) Without veteran preference. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service.

"Each of said eight Attorneys, Grade P–3, thus in retention Subgroup A–2, has been retained in his or her position of Attorney, Grade P–3 at all times since June 6, 1947, and continues to be employed on active duty in said Washington office of the Office of the Solicitor as of September 5, 1947, the date of this affidavit. Under retention Subgroup B–1 in said official retention register appeared the names of three men, including plaintiff, each one of whom received an identical separation notice May 29, 1947, and has been finally and completely separated in the same manner as plaintiff. Like plaintiff, each one is carried on the records of the Office of the Solicitor as (1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter" (R. 47–48).

and showing that (R. 50–51)—

"29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P–3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment in wrongful preference to plaintiff other competing employees, the same being nonveterans' preference Attorneys, Grade P–3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency

rating of 'very good,' as well as assuming to perform functions and duties which plaintiff was and is capable of performing" (R. 50).

5. This Court erred in failing to hold that

These undenied allegations charge a direct violation of Elder's preferential right to be retained in his position of Attorney, Grade P–3, under §§ 2 and 12 of the Veterans' Preference Act of 1944.

6. This Court erred in failing to hold that

If the record remains as it is, the District Court should enter summary judgments to the effect that on June 30, 1947, and during all times thereafter, each of the appellants was wrongfully denied and deprived of his preferential right to be retained in his position of Attorney, Grade P–3. However, if the Secretary of Agriculture denies such allegations, the District Court should, of course, proceed to determine the issue of fact so presented.

7. This Court erred in declaring (Opinion, 3–4) that in the Hilton case this Court and the Supreme Court approved all group and subgroup classifications of the 1947 Retention Preference regulations of the Civil Service Commission cited to 5 Code Fed. Regs. § 20.3, Supp. 1947.

The question of validity of Groups B or C, or of any other than the validity of the absolute retention preference provided under subgroups A–1 plus and A–1, was not raised or ruled upon at any stage in the Hilton case, either in this Court or in the Supreme Court. Even the validity or nonvalidity of subgroups A–2, to which the nonveteran Hilton was assigned, was never raised or ruled upon, since Hilton's right to retention in that case, as against the A–1 plus and A–1 veterans who were alone retained in preference to Hilton, could not in any way be affected by any such consideration or determination.

There was at no time any assignment of error presenting any such question related to subgroups A–2 or A–4, or related to Groups B or C or the retention preference of any veterans of limited tenure of employment; and no argument whatever on any such question was ever presented to the Court of Appeals or to the Supreme Court in the Hilton case.

As repeatedly stated by the Supreme Court in the same terms in many other cases:

"The most that can be said is that the point was in the record if anyone had seen fit to raise it. Questions that merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Kvos v. Associated Press, 299 U. S. 269, 279; Webster v. Fall, 266 U. S. 507, 511; Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 119; New v. Oklahoma, 195 U. S. 252, 256.

Instead of a bulk approval and affirmance in toto of the 1947 regulations or of the primary division of veterans between Groups A, B, and C, based on the tenure of their employment [as argued here by counsel for appellee, Br. 16, to the misguidance of this Court], the Supreme Court took particular pains to point out that the categorical assignment of nonveteran employees of classified (permanent) tenure to the "highest retention status" under Group A, and the assignment of veterans of limited tenures to lower retention status, as these appellants under Group B, was

"* * * regardless of veterans' preference and of efficiency rating * * *"

Hilton v. Sullivan, 334 U. S. 323, 337, the Court's footnote 10.

This footnote 10 explicitly attests the Supreme Court's awareness of the disregard and violation inherent in both the 1943 and 1947 Retention Preference regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenure, as the appellants here. The legal soundness of the Court's indication of this inherent violation of the Veterans' Preference Act of 1944 is not abated by reason of its being obiter dictum. Webster v. Fall, and other cases last above cited.

8. This Court erred in approving and applying as valid herein the subgroups A–2, A–4, and B–1 of the 1947 regulations of the Commission.

The classifications of the 1947 regulations proceed upon the untenable assumption that the applicable proviso of § 12 is nothing but meaningless surplusage.

By the device of Groups A, B, and C, the 1947 regulations give effect to "tenure of employment" as the primary and paramount criterion for relative retention preference among all employees. "Military preference," mentioned second after "tenure of employment" in the first clause of § 12, is given effect only as a sort of minor abscissa within and subordinated to the aforesaid primary and paramount criterion of "tenure of employment" expressed in the subgroups A–1, A–2, A–3, A–4, covering permanent tenure of employment; B–1, B–2, B–3, B–4, covering "war-service" tenure of employment; C–1, C–2, C–3, C–4, covering temporary or less-than-one-year tenure of employment. It is to be noted particularly that

A–2 comprises nonveterans of permanent tenure of employment "unless efficiency rating is less than 'good'."

A–4 comprises nonveterans of permanent tenure of employment "where efficiency rating is less than 'good'."

B–1 comprises veterans' preference employees "With veteran preference unless efficiency rating is less than 'good'."

"Tenure of employment" is thus given effect as the "highest retention status" with permanent employees given priority over all veterans' preference employees whose efficiency ratings are "good" or better as well as nonveterans of limited tenures. As pointed out by the Supreme Court, this "highest retention status" is "regardless of veterans' preference and of efficiency rating." Hilton v. Sullivan, 334 U. S. 323, 337, the Court's footnote 10.

What the Supreme Court had in mind is very clear. The 1947 regulations make the criterion of "tenure of employment" decisive in the determination of relative retention rights between all employees—including as well the proviso-excepted special class of veterans' preference employees whose efficiency ratings are "good" or better. This special class of veterans' preference employees appears in subgroups A–1, B–1, and C–1.

But this is the special class of preference employees concerning which Congress has significantly attached to the first clause of § 12 and enacted the absolute command:

"* * * *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all competing employees, * * *"

The closest inspection and scrutiny fails to reveal that the seriatim classification scheme of the 1947 regulations takes into account in any way whatever this applicable proviso which, as the Supreme Court has explicitly recognized, is "the heart of the section." Hilton v. Sullivan, 334 U. S. 323, 338.

Obviously, this seriatim classification scheme of the 1947 regulations is set up with reference to the first clause only. It is set up to the entire exclusion of the applicable proviso commanding the exception of the proviso-defined veterans' preference employees from the operative effect of the first clause of § 12. Most obviously, the only veterans' preference given by the regulations to Elder and other members of the proviso-excepted special class of veterans is wholly confined to the "sort of seriatim effect" given the inferior secondary factor of "military preference" in accordance to its position after "tenure of employment" in the first clause of § 12.

The entire scheme and procedure of the 1947 Retention Preference regulations was without the shadow of a doubt set up exclusively in contemplation and with reference to the seriatim order of the four factors of tenure of employment, military preference, length of service, and efficiency ratings in the first clause of § 12. The applicable proviso plainly had nothing to do with any of it.

The administrative construction embodied in the 1947 regulations of the Commission disregarded the applicable proviso with a sort of selective blindness. It plainly misconstrued the first

clause alone as being the only "congressional directive" which either the Commission or appellee was under any obligation to obey or even consider. (Appellee's Br. 15–16.) For them the proviso was not simply meaningless; it was non-existent.

The subgroups A–2, A–4, and B–1 thus embodied an administrative construction which gave meaning and effect only to the first clause of § 12, and left the applicable proviso wholly out of consideration. The Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by amputating, subtracting, and eliminating the applicable proviso which contains an absolute command of the Congress. The 1947 regulations of the Commission then proceeded to give effect, of a sort, to the first clause alone. This, of course, is contrary to settled law.

Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. United States v. Standard Brewery Co., 251 U. S. 210, 217–220; Miller v. Standard Nut Margarine Co., 284 U. S. 498, 508; Schanzer v. Bowles, Price Administrator, Em. Ct. App., 141 F. (2d) 262, 264; Durkee Famous Foods, Inc., v. Harrison, 7 Cir., 136 F. (2d) 303, 307.

As succinctly held by the court in Kaufman v. United States, 131 F. (2d) 854, 857 (CCA–4, 1942):

"It needs no argument that he cannot, by such regulations, alter or amend an Act of Congress or limit rights granted by it."

As held by the Supreme Court in Campbell v. Galeno Chemical Co., 281 U. S. 599, 610:

"The limits of the power to make regulations are well settled (cit. cases). They may not extend a statute or modify its provisions."

And in Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129, 134, the Supreme Court said:

"The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

See, elaborating upon the same point: Field v. Clark, 143 U. S. 649, 692; United States v. Eaton, 144 U. S. 677, 687; United States v. Grimaud, 220 U. S. 506, 518; Utah Power & Light Co. v. United States, 243 U. S. 389, 410; Panama Refining Co. v. Ryan, 293 U. S. 388, 428; Schechter Poultry Corp. v. United States, 295 U. S. 495, 537–538; International Ry. Co. v. Davidson, 257 U. S. 506, 514; Corner Broadway-Maiden Lane, Inc., v. Commissioner of Internal Revenue, 76 F. (2d) 106, 108 (CCA–2, 1935); Commissioner of

Internal Revenue v. Van Vorst, 59 F. (2d) 677, 679 (CCA–9, 1932); Allis v. La Budde, 128 F. (2d) 838, 840 (CCA–7, 1942).

Subgroups A–2, A–4, and B–1 of the 1947 regulations are also contrary to other elementary principles of statutory interpretation.

The intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. Thompson v. United States, 280 U. S. 420, 442; and cases cited infra.

The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them. Caminetti v. United States, 242 U. S. 470, 485; United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409–410; Dewey v. United States, 178 U. S. 510, 520, 521.

"All other competing employees" thus means all competing employees other than preference employees whose efficiency ratings are "good" or better. United States v. Mescall, 215 U. S. 26, 31–32.

This meaning is unnecessarily corroborated by the correlative use of the words "competing nonpreference employees" in the next ensuing proviso contained in the same paragraph of § 12.

"Competing", in its natural import and usual and most ordinary sense according to Webster's New International Dictionary, means "seeking or striving for the same thing, position, or reward for which another is striving"—as here, the positions of Attorneys, Grade P–3 which are the subject of these suits.

Arguing for a holding of the validity of subgroups A–2, A–4, and B–1, and of the validity of the classification of the appellants, as preference employees whose efficiency ratings are "good" or better, under subgroups B–1 inferior to the non-veteran non-preference employees under A–2 and A–4, counsel for appellee urge: "They were entitled to no more under the Act and the regulations. To hold otherwise would emasculate the civil service so that a veteran with the most limited appointment would have preference over a civil servant with permanent classified status."

But as the Supreme Court has on many occasions declared and held:

"Considerations of this nature or of inconvenience can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language." Houghton v. Payne, 194 U. S. 88, 100; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 330, 331; Brewster v. Gage, 280 U. S. 327, 336; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Louisville & Nashville R. Co. v. United

States, 282 U. S. 740, 757, 759; Texas & Pac. R. Co., v. United States, 289 U. S. 627, 640; United States v. Tanner, 147 U. S. 661.

However long continued by successive officers, an administrative construction of a statute must yield to the positive language of the statute. Houghton v. Payne, 194 U. S. 88, 100; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 330, 331; Brewster v. Gage, 280 U. S. 327, 336; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Louisville & Nashville Ry. Co. v. United States, 282 U. S. 740, 757, 759; Texas & Pac. Ry. Co. v. United States, 289 U. S. 627, 640; United States v. Tanner, 147 U. S. 661.

Under the positive language of § 12 of the 1944 Act, considered in connection with the positive language of § 2 thereof, appellee was clearly and mandatorily required to retain the appellants, as veterans' preference employees whose efficiency ratings are "good" or better, in their civilian positions of Attorneys, Grade P–3, in preference to all other nonveteran nonpreference Attorneys, Grade P–3; and appellee's admitted failure so to do violated the appellants' legal rights under the Veterans' Preference Act of 1944 and §§ 2 and 12 thereof.

Wherefore, the premises considered, your petitioners respectfully pray that modification of the opinion, and of the respective judgments pursuant thereto, be granted in the particulars indicated.

C. L. Dawson,
C. L. Dawson,
917 15th St. NW., Washington 5, D. C.,
Attorney for Appellants.
Robert D. Elder,
Robert D. Elder,
4433 32d Road South, Arlington, Virginia.
Attorney pro se and pro hac vice by special leave of this Court.

Received by each of the undersigned, one copy of the within Petition for modification of opinion and judgments, this 30th day of June 1950.

George Morris Fay,
by J. Langer,
Attorneys for Appellee,
the Secretary of Agriculture.

In the United States Court of Appeals for the District of Columbia Circuit

[Title omitted.]
[File endorsement omitted.]

Supplemental designation of record

Filed January 3, 1951

The Clerk will please prepare a certified copy of appellants' petition for modification of the opinion and judgment for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

JANUARY 2, 1951.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above supplemental designation of record has been served on counsel for respondents by mail.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

[Clerk's certificate to foregoing papers omitted in printing.]

Supreme Court of the United States

No. 473, October Term, 1950

Order allowing certiorari

Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 474, October Term, 1950

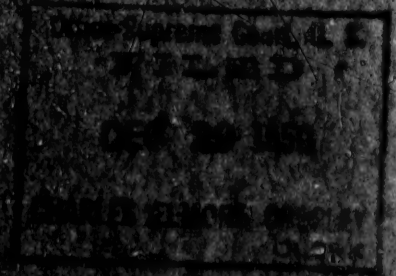
Order allowing certiorari.

Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.



INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Hilton v. *Sullivan*, 334 U. S. 323	9
Keim v. *United States*, 177 U. S. 290	7
Love v. *United States*, 108 F. 2d 43, certiorari denied, 309 U. S. 673	7
Mitchell v. *Cohen*, 333 U. S. 411	7
Statute:	
Veterans Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C. Supp. III, 851, 856, 857, 858, 860, 861, 864)	2
Sec. 2	5, 6, 10, 11
Sec. 7	8, 12
Sec. 8	8, 13
Sec. 9	14
Sec. 11	8, 14
Sec. 12	5, 6, 8, 9, 14
Sec. 14	3
Sec. 15	6, 8, 9, 15
Miscellaneous:	
Civil Service Regulations, 5 CFR (1949):	
Part 2:	
Sec. 2.107	9, 16
Part 20:	
Sec. 20.1	6, 9
Sec. 20.3	3, 18
Sec. 20.8	20

922007—51——1

Miscellaneous—Continued

Civil Service Regulations, 5 CFR (1949)—Continued

	Page
Part 21:	
Sec. 21.1	21
Sec. 21.2	22
Sec. 21.3	22
Sec. 21.5	9, 23
Sec. 21.6	9, 24
Sec. 21.7	9, 26
90 Cong. Rec. 3503	7
9 F. R. 9575	9
9 F. R. 13699	9
10 F. R. 3003	9
12 F. R. 2832	9
12 F. R. 2849	6
12 F. R. 2850	3
Hearings before the Senate Committee on Civil Service on H. R. 4115, 78th Cong., 2d sess., p. 9	7
H. Rep. No. 1289, 78th Cong., 2d sess., p. 3	7
Sen. Rep. No. 907, 78th Cong., 2d sess., p. 2	7

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 473

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Charles F. Brannan, individually and as Secretary of Agriculture, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case[1] on June 15, 1950.

OPINIONS BELOW

The memorandum opinion of the district court (R. 72) is not reported. The opinion of the

[1] The cases were consolidated for hearing in the district court (R. 84) and were briefed and argued together before the court of appeals (R. 88).

Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on October 2, 1950 (R. 100). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under the Veterans Preference Act of 1944 the reemployment rights of veterans properly separated from their positions in federal service are governed by the reduction-in-force regulations under Section 12 of the Act, rather than by Section 15 which deals specifically with preference in reemployment.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Veterans Preference Act of 1944 (58 Stat. 387, 5 U. S. C. Supp. III § 851 *et seq.*) and of the Regulations of the Civil Service Commission are set forth in the Appendix (*infra*, pp. 11–27).

STATEMENT

These actions were brought by respondents, honorably discharged veterans entitled to the benefits of the Veterans Preference Act of 1944, 58 Stat. 387 (Appendix, *infra*, pp. 11–16) (R. 3,

77), for mandatory injunctions to restrain their separation from the Department of Agriculture and for declaratory judgments (R. 2–7, 76–82). Amended and supplemental complaints alleged the violation of respondents' rights in the retention and reemployment of other employees (R. 52–53).

In July and August of 1943, respondents entered federal service in the positions of associate attorneys (Grade P–3) in the Office of the Solicitor of the Department of Agriculture (R. 3, 77). Their appointments were limited to the duration of the war and six months thereafter, and they did not acquire classified civil-service status (R. 72, 90). On May 29, 1947, together with eighteen other attorneys, they were notified that, pursuant to a reduction in force necessitated by a shortage of funds, they would be separated from the service effective June 30, 1947 (R. 8, 70, 71). The separation was effected in due course (R. 60).

Respondents appealed their separation to the Civil Service Commission under Section 14 of the Veterans Preference Act of 1944 (R. 33). The Commission found that the action had been taken in conformity with its reduction-in-force regulations and denied the appeals (R. 34, 63).[2] On

[2] The Civil Service Commission "Retention Preference Regulation for use in Reductions in Force," 12 F. R. 2850, 5 CFR (1949) § 20.3 provide: "For the purpose of determining relative retention preference in reductions in force, em-

June 5, 1947, while the appeals to the Commission were pending, respondents instituted these actions.

Some time subsequent to separation of respondents, additional funds became available to the Department of Agriculture and were allotted to the Office of the Solicitor, and several attorneys who had not been reached for separation resigned (R. 71). Neither of those events could have been foreseen at the time of respondents' separation (R. 72). Thereupon, the Solicitor reemployed nine attorneys, including one veteran, the first of whom took office on October 27, 1947, five months after respondents' notice of separation (R. 72). Several of the attorneys rehired had been separated at the same time as respondents but with

---

ployees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

* * * * *

Group B. All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than 'Good'.

B–2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *"

Respondents, as war-service appointees with veteran preference and efficiency ratings of good or better were properly classified in subgroup B–1.

inferior positions on the retention register (R. 52). The nine attorneys were selected on the basis of training and experience and their particular suitability for the positions they were to fill (R. 72).

The district court found that respondents had been separated "in full compliance with the applicable statutes and regulations" and granted petitioner's motion for summary judgment (R. 72). The district court apparently did not consider any question of discrimination in reemployment. Similarly, on appeal, the only issues presented related to the validity of respondents' separation and not to discrimination in reemployment. The court of appeals agreed with the lower court and the Civil Service Commission that the separation had been proper, but it reversed the decision below on the ground that Section 2 and the reduction-in-force regulations under Section 12 of the Veterans Preference Act of 1944 created reemployment rights which "were violated * * * when other attorneys, classified in a lower subgroup than B–1, who had been released with [them], were reemployed" (R. 93). Since the district court granted a motion for summary judgment, the cases were remanded for determination of the single issue of discrimination in reemployment (R. 95).

The Government filed a petition for a rehearing (R. 97) on the grounds that the issue of reemployment had not been argued by the parties

and that the scope of reemployment preference was prescribed in Section 15 of the Act, which had not been briefed by the parties or discussed by the Court, and not by Section 2 or Section 12. The petition requested the court, in the event rehearing was not desired, to modify its opinion to direct the district court to hear the question of compliance with the statutory provisions and regulations dealing with reemployment preferences (R. 99). The petition for rehearing was denied (R. 100).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it interprets erroneously the Veterans' Preference Act of 1944 in a manner which has a very serious impact on the Federal Government's personnel policies and practices.

1. Relying upon the general language of Section 2 of the Act (*infra*, p. 11) to the effect that "preference shall be given" honorably discharged veterans "in certification for appointment, in appointment, in reinstatement, in reemployment, and in retention," the court below applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 (*infra*, p. 15)[3] as the measure of veterans' *reemployment* rights. In reaching its decision, the court completely ignored Section 15 of the Act (*infra*, p. 16) where Congress carefully

[3] 12 F. R. 2849, 5 CFR (1949) § 20.1 *et seq.*

delimited the scope of the veteran's reemployment rights. The effect of the holding is to substitute for the statutory measure of veterans' reemployment rights the completely different standards established by statute and regulation with respect to retention in employment.

The result reached by the court below is in clear violation of the statutory purpose. The structure of the statute makes unmistakably plain its purpose, first, to describe the persons entitled to its benefits and, then, to define those benefits. Thus, Section 2 (*infra*, p. 11), which the court below apparently assumed conferred specific rights, does no more than enumerate the classes of persons who shall be entitled to various employment preferences. See *Mitchell* v. *Cohen*, 333 U. S. 411; cf. *Keim* v. *United States*, 177 U. S. 290; *Love* v. *United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673. The legislative history of the Act establishes beyond question that Section 2 was regarded as simply "defining the various groups to whom preference [was] to be granted." H. Rep. No. 1289, 78th Cong., 2d sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d sess., p. 2. This intention was announced by Representative Starnes, author of the bill, in explaining the bill in the House (90 Cong. Rec. 3503, 78th Cong., 2d sess.) and during the Senate Hearings on the bill. Hearings before the Senate Committee on Civil Service on H. R. 4115, 78th Cong., 2d sess., p. 9.

The later sections define the substance of the "preference" conferred with respect to appointment, reemployment, reinstatement and retention. Under the statutory scheme, Sections 7 (*infra*, p. 12) and 8 (*infra*, p. 13) prescribe the preference to be accorded a veteran in certification for appointment, Section 12 (*infra*, p. 15) in retention, and Section 15 (*infra*, p. 16) in reemployment and reinstatement after separation without fault. It is therefore an obvious error to apply to the reemployment rights under Section 15 the retention standards promulgated under Section 12.

Section 15 deals specifically and exclusively with the reemployment preference to be accorded a veteran who, like respondents, has been separated from the service without misconduct or delinquency on his part.[4] Upon request, he may have his name placed on all registers and employment lists for positions for which he is qualified. His rank on the register or list is to be in accordance with a rating augmented because of his veteran's status and his name is to be placed ahead of all non-veterans with the same rating. Thereafter, when reached for appointment, his name is submitted to the appointing officer with the two next highest ranking on the list. The appointing officer must select one of the three, but need not choose the veteran provided he can justify his choice. Where a reemployment list

[4] The provisions of Sections 7 and 8 dealing with original appointments are incorporated by reference in Section 15.

for a position contains the names of three or more preference eligibles, no appointment, except of a ten-point preference eligible, may be made from an examination roster. Pursuant to statutory authority (Sec. 11, 5 U. S. C. 860), the Civil Service Commission has promulgated regulations to implement the reemployment provisions of Section 15. 10 F. R. 3003, 5 C. F. R. (1949) 21.5–21.7; 12 F. R. 2832, 5 C. F. R. (1949) 2.107.

Section 12, on the other hand, relates only to personnel reductions and the Commission's reduction-in-force regulations, issued specifically under the authority of Section 12, deal exclusively with retention preferences. 9 F. R. 9575; 9 F. R. 13699; 5 C. F. R. (1949) 20.1 *et seq.* See *Hilton* v. *Sullivan,* 334 U. S. 323. The system of preferences for discharges established by the statute and implemented by the regulations bears no resemblance whatever to that established for reemployment. There is no basis in the statute, the regulations, or in reason for substituting the preferences created in the one employment area for those established in the other. Had the court below tested the respondents' reemployment rights against the statutory standards for reemployment it would necessarily have reached an opposite result. For there has been no finding, or even an allegation, that the provisions of Section 15 were not followed in these cases.

2. The decision below, in using reduction-in-force regulations as a yardstick for reemploy-

ment, casts doubt upon the validity of countless personnel actions taken in the past in reliance upon the explicit statutory provisions and regulations relating to reemployment, and raises serious doubts as to the course to be followed in the future. It establishes a judicial system of preference regulation not sanctioned by statute. Moreover, in holding that Section 2, without more, confers preference benefits, the decision may create boundless confusion in the entire field of veterans' preference in the federal service. If the definition of the scope of preferences is not to be found in the specific sections of the act dealing with particular aspects of employment, neither the Civil Service Commission, the employing agency, nor the veteran himself has any reliable guide to the meaning of "preference" in a particular situation. The end product of such uncertainty must be a proliferation of suits alleging violations of supposed rights under Section 2 in certification, appointment, reinstatement, reemployment, and retention.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER, 1950.

APPENDIX

A. Statute

The pertinent portions Sections 2, 7, 8, 9, 11, 12, and 15 of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C. Supp. III, 851, 856, 857, 858, 860, 861, 864), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected

disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; * * *

* * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided,* That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in ac-

cordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided,* That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency or such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative

upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

* * * * * *

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings:

Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

* * * * *

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and

reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

B. Regulations

The pertinent portions of the Civil Service Regulations, 5 CFR (1949) Parts 2, 20 and 21, provide:

PART 2—APPOINTMENT THROUGH THE COMPETITIVE SYSTEM

* * * * *

§ 2.107 *Eligible registers.* (a) The names of persons who qualify in competitive examinations shall be entered on appropriate registers in the order of their ratings, as may be augmented by veteran preference, subject to apportionment, residence, or other requirements of law or the Commission's regulations.

(b) When an eligible register has been established as the result of open competitive examination, the names of the following classes of persons may be entered thereon, provided they have a competitive status:

(1) Persons declared eligible by the Commission after appeal from separation under section 14 of the Veterans' Preference Act;

(2) Veterans who have been furloughed or separated without delinquency or misconduct, or who have resigned from the service, and applied for reentry of their names on such register.

Application for entrance on a register under this paragraph must be filed within 90 days of separation or failure of restoration or reemployment. Applicants shall be examined under the same standards used in the open competitive examination and their names shall be entered on the register in the order prescribed by paragraph (a) of this section.

(c) (1) Veterans who were in the armed forces of the United States subsequent to May 1, 1940, and for that reason lost eligibility on a register during a period that the register was used for probational appointment, shall have their names entered on the appropriate successor register if they:

(i) Have been honorably separated from the armed forces;

(ii) Are still qualified to perform the duties of the position for which the register is used; and

(iii) Make application for entrance on the register within 90 days after separation from active service or from hospitalization continuing after discharge for a period of not more than one year. Such persons shall be restored to the successor register, for the life of such register, in accordance with their former ratings as augmented by preference points, except as provided in subparagraph (2) of this paragraph.

(2) Persons who establish eligibility for entrance on a successor register in accordance with subparagraph (1) of this paragraph, shall have their names entered at the top of the appropriate group on the successor register if another person standing lower on the register on which their names formerly appeared was given a probational

appointment from such register. For the purpose of determining the appropriate group all 10-point veterans including such restored veterans, will be considered as one group, and all other eligibles including such restored 5-point veterans, as another group. However, for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, all eligibles will be considered as one group.

(3) Persons who meet the conditions for entrance on a successor register in accordance with subparagraphs (1) of this paragraph shall have their names listed for certification for probational appointment if no successor register exists and another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register.

(4) A person having eligibility under subparagraphs (2) or (3) of this paragraph who, due to disability incurred because of military service in World War II, is unable to perform the duties of the position designated by him at the time of taking the examination for appointment thereto, may upon written request at any time have his name entered upon any list of eligibles for which a like examination is required and shall continue to have the rights granted by subparagraphs (2) or (3) of this paragraph.

* * * * * *

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE

* * * * * *

§ 20.3 *Retention preference*—(a) *Classification.* For the purpose of determining

relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all status and non-status employees currently serving in excepted positions under appointments without time limitation, or all employees who transferred from absolute or probational appointments in the competitive service to war service indefinite or trial period excepted appointments.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating is less than "Good".

A–2 Without veteran preference unless efficiency rating is less than "Good".

A–3 With veteran preference where efficiency rating is less than "Good".

A–4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good".

B–2 Without veteran preference unless efficiency rating is less that "Good".

B–3 With veteran preference where efficiency rating is less than "Good".

B–4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees in the competitive service serving under appointments with definite time limitations imposed in accordance with § 2.114 (c) of this chapter, or in accordance with specific authority of the Commission, all employees in the excepted service with definite time limitations of one year or less, all noncitizen employees serving within the continental limits of the United States, its territories or possessions, all employees continuing beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good".

C–2 Without veteran preference unless efficiency rating is less than "Good".

C–3 With veteran preference where efficiency rating is less than "Good".

C–4 Without veteran preference where efficiency rating is less than "Good".

* * * * * *

§ 20.8 *Sequence of selection.* Within each competitive level, action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, action must be taken concerning all employees with a lower number of retention credits before an employee

with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy.

* * * * *

PART 21—APPOINTMENT TO POSITIONS EXCEPTED FROM THE COMPETITIVE SERVICE

§ 21.1 *Extent of regulations*—(a) *Positions covered.* The regulations in this part shall apply to all positions (1) in the executive branch of the Federal Government that are excepted from the competitive service; (2) in any temporary or emergency establishment, agency, bureau, administration, project, and department created by acts of Congress or Presidential Executive order which are excepted from the provisions of the Civil Service Act of January 16, 1883; and (3) in the civil service of the District of Columbia. Positions excepted from the competitive service include all positions excepted from the provisions of the Civil Service Act of January 16, 1883, by statute or Executive order, including positions listed in Part 6 of this chapter, positions which may be filled by persons under personal service contract, and positions in Government owned or controlled corpora-

tions. The civil service of the District of Columbia includes all positions in the Government of the District of Columbia, and positions under the Board of Education and the Board of Library Trustees of the District of Columbia.

(b) *Applicability.* The provisions of the regulations in this part respecting the examination, rating, and selection for appointment of applicants are required to be followed whenever a qualified person entitled to preference under § 21.2 applies for consideration for appointment. Such provisions may be followed, in the discretion of the agency, in making appointments when no preference applicant applies.

§ 21.2 *Persons entitled to military preference.* In actions taken under the regulations in this part, five-point military preference or ten-point military preference as specified in section 3 of the Veterans' Preference Act of 1944 shall be granted to those persons specified in section 2 of that act. Separation under honorable conditions, as used therein, shall mean any separation from active duty in any branch of the armed forces under honorable conditions. A transfer to inactive status, a transfer to retired status, the acceptance of a resignation, or the issuance of a discharge will be considered as covered by the above definition if such separation was under honorable conditions.

§ 21.3 *Receipt of applications; uniform treatment.* Each agency shall establish definite rules regarding the acceptance of applications for employment in positions covered by the regulations in this part. Such rules shall be made of record in the agency and shall be uniformly applied to

all persons who meet the conditions of such rules. Information regarding the rules shall be furnished upon request.

* * * * *

§ 21.5 *Examination of applicants*—(a) *Rating.* The agency may provide for an evaluation of the qualifications of all applicants for a position, who are available under §§ 21.3 and 21.4 at any time prior to appointment being made to such position. Numerical ratings shall be assigned on a scale of 100 and all applicants rated 70 or more shall be eligible for appointment: *Provided,* That no numerical ratings need be assigned whenever all qualified applicants will be offered immediate appointment: *Provided further,* That whenever there is an excessive number of applicants, only a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable length of time need be given numerical ratings; in such cases the agency shall adopt procedures which will insure consideration of all preference applicants in the order in which they would have been considered if all applicants had been assigned numerical ratings. To the earned numerical ratings of applicants entitled to five-point preference, five points shall be added and to the earned numerical ratings of applicants entitled to ten-point preference, ten points shall be added. A notice of the rating assigned shall be furnished upon request.

No consideration shall be given the application of any non-preference applicant, nor shall such application be rated, for the positions of elevator operator, messenger, guard and custodian as long as qualified

applicants entitled to preference are available for such position.

Whenever experience is a factor in determining eligibility, an applicant entitled to five-point or ten-point preference under the regulations in this part shall be credited with time spent in the military or naval service of the United States when the position for which he is applying is similar to that he held immediately prior to his entrance into the military or naval service; credit shall also be given such applicant for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

§ 21.6 *Maintenance of employment lists*—(a) *Establishment of lists.* All applicants assigned eligible numerical ratings in accordance with § 21.5 shall have their names entered on either (1) the appropriate reemployment list or (2) the appropriate regular employment list. The names of all such applicants shall be entered on said lists in accordance with their ratings, except that the names of applicants entitled to five- or ten-point preference under the regulations in this part shall be entered on such lists in accordance with their respective augmented ratings, and the name of a preference applicant shall be entered ahead of all others having the same rating: *Provided,* That except on lists of applicants for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, the names of applicants entitled to ten-point preference under the regulations in this part shall be placed at the top of the appropriate lists.

(b) *Reemployment list.* The reemployment list will consist of the names of former employees of the agency who are to be considered for future employment, and shall, in any case, include the following:

(1) The names of former employees of the agency entitled to preference under the regulations in this part who have been furloughed or separated without delinquency or misconduct and who apply for reemployment.

(2) The names of any former employees of the agency entitled to preference under the regulations in this part who are found by the Commission, in accordance with § 21.10, to have been unjustifiably dismissed from the agency.

(c) *Regular employment list.* Eligible applicants assigned numerical ratings who are not entered on the agency reemployment list shall be entered on the regular employment list.

(d) *Order of consideration.* (1) The names of all applicants who are assigned eligible numerical ratings for a given position shall, except as provided below for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, be considered either in Order A or in Order B, below:

(i) Order A: (*a*) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(*b*) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(*c*) The names of all other qualified applicants on the agency's reemployment lists in the order of their numerical ratings.

(*d*) The names of all other qualified applicants in the order of their numerical ratings.

(ii) Order B: (*a*) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(*b*) The names of all other qualified applicants on the agency's reemployment list, in the order of their numerical ratings.

(*c*) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(*d*) The names of all other qualified applicants, in the order of their numerical ratings.

(2) The names of all applicants assigned numerical eligible ratings for professional and scientific positions for which the basic entrance salary is over $3,000 per annum shall be considered in the following order:

(i) The names of applicants on the agency's reemployment list, in the order of their numerical ratings.

(ii) The names of all other applicants, in the order of their numerical ratings.

§ 21.7 *Selection and appointment*—(a) *Selection.* In making appointments from employment lists the agency shall make selection for appointment to each vacancy from not more than the highest three names available for appointment in the order provided in § 21.6 (d): *Provided,*

That the agency need not accord eligibles on the agency reemployment list the preferential consideration provided in that section for such eligibles if such list contains the names of less than three applicants entitled to preference under the regulations in this part: *Provided further*, That the agency need not consider any applicant who has previously been considered three times, nor any preference applicant who has been disqualified under the provisions of paragraph (b) of this section. The second and any additional vacancies shall be filled in like manner.

(b) *Passing over a preference applicant.* Whenever an agency in making a selection of a nonpreference applicant in accordance with paragraph (a) of this section passes over the name of a preference applicant who, under § 21.6 (d), is entitled to prior consideration, it shall record its reasons for so doing. A copy of such reasons shall, upon request, be sent to the preference applicant or his designated representative.

When, in making appointments to a position, an agency has on three occasions passed over the name of a preference applicant and recorded its reasons for so doing, consideration of his name for such position may thereafter be discontinued.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1951

LIBRARY
SUPREME COURT U.S.

Supreme Court, U.S.
FILED
MAR 28 1951

No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1950

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER AND GERTIE CHANDLER FURMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Statement	2
Specification of Errors To Be Urged	10
Summary of Argument	11
Argument	12
I. Section 2 of the Veterans' Preference Act merely declares a policy of preference and does not, without reference to subsequent sections, grant specific preference benefits	13
II. Respondents' rights to be rehired must be tested against the statutory standard of Section 15, dealing with reemployment, rather than Section 12, dealing with reduction-in-force	21
III. The decision below overrides long standing regulations of the Civil Service Commission and substitutes a judicial system of preference regulation not sanctioned by the statute	24
Conclusion	26
Appendix	27

CITATIONS

Cases:	
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410	26
Commissioner v. *South Texas Co.*, 333 U. S. 496	25
Helvering v. *Wilshire Oil Co.*, 308 U. S. 90	25
Hilton v. *Sullivan*, 334 U. S. 323	18, 23, 24
Keim v. *United States*, 177 U. S. 290	14
Love v. *United States*, 108 F. 2d 43, certiorari denied, 309 U. S. 673	14
Mitchell v. *Cohen*, 333 U. S. 411	13
United States v. *American Trucking Associations*, 310 U. S. 534	25
Statutes:	
Selective Training and Service Act of 1940, Sec. 8	18
Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. and 5 U. S. C., Supp. III, 851 *et seq.*)	2
Section 1	15
Section 2	9, 10, 11, 12, 13, 14, 17, 18, 20, 27
Section 3	15
Section 4	15

Statutes—Continued
Veterans' Preference Act, etc.—Continued Page
Section 5 15
Section 6 15
Section 7 15, 17, 21, 28
Section 8 15, 17, 21, 28
Section 9 15, 30
Section 10 15
Section 11 15, 24, 30
Section 12 10, 11, 13, 15, 16, 17, 18, 23, 30
Section 13 15, 16, 20, 31
Section 14 16, 15
Section 15 10, 11, 13, 16, 20, 21, 22, 31
Section 16 15
Section 17 15
Section 18 15
Section 19 15
Section 20 15
Regulations:
Civil Service Regulations, 5 CFR (1949):
Part 2 21, 32
Part 7 19, 20, 35
Part 20 5, 23, 36
Part 21 21, 22, 39
Regulations of the Board of Legal Examiners (8 F. R. 5208, 5 C. F. R. Cum. Supp. 1457):
Section 17.1 (g) 3
Miscellaneous:
Civil Service Acts, Rules and Regulations, annotated (amended to October 31, 1943), p. 171 3
90 Cong. Rec. 3503, 78th Cong., 2d sess. 14
90 Cong. Rec. 3505 24
90 Cong. Rec. 5784–5 14
Executive Order No. 9063, February 16, 1942 (7 F. R. 1075, 3 C. F. R. Cum. Supp. 1093) 3
Executive Order No. 9358, June 20, 1943 (8 F. R. 9175) 3
Federal Personnel Manual, p. Z1–245 19
9 F. R. 9575 23
9 F. R. 13699 23
12 F. R. 2832, 5 C. F. R. § 2.107 21
12 F. R. 2850 5
Hearings Before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d sess., p. 9 14, 24
H. Rep. No. 1289, 78th Cong., 2d sess., p. 3 14, 24
24 Op. Atty. Gen. 103, August 27, 1902 20
Sen. Rep. No. 907, 78th Cong., 2d sess.:
Page 1 24
Page 2 14

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 473

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

OPINIONS BELOW

The memorandum opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on October 2, 1950 (R. 100). The petition for a writ of certiorari in No. 473 was

filed on December 29, 1950. Certiorari was granted on February 26, 1950. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under the Veterans' Preference Act of 1944 the reemployment rights of veterans properly separated from their positions in federal service are governed by the reduction-in-force regulations under Section 12 of the Act, rather than by Section 15 which deals specifically with preference in reemployment.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Veterans' Preference Act of 1944 (58 Stat. 387, 5 U. S. C. and 5 U. S. C., Supp. III, 851 *et seq.*) and of the Regulations of the Civil Service Commission are set forth in the Appendix (*infra,* pp. 27–45).

STATEMENT

These actions were brought by respondents, honorably discharged veterans entitled to the benefits of the Veterans' Preference Act of 1944, 58 Stat. 387 (Appendix, *infra,* pp. 27–32) (R. 3, 77), for mandatory injunctions to restrain their separation from the Department of Agriculture and for declaratory judgments (R. 2–7, 76–82). Amended and supplemental complaints alleged the violation of respondents' rights in the retention and reemployment of other employees (R. 52–53).

1. For the purposes of the present case (No. 473), the undisputed facts are as follows: In September, 1942, respondents took and passed the Federal Civil Service Legal Examination and their names were placed on the Civil Service Register of Attorney Eligibles (R. 3, 77). In July and August of 1943, respondents entered federal service in the positions of associate attorneys (Grade P–3) in the Office of the Solicitor of the Department of Agriculture (R. 3, 77). At the time respondents entered federal service all appointments to attorney positions were governed by Section 17.1 (g) of the Regulations of the Board of Legal Examiners (8 F. R. 5208, 5 C. F. R. Cum. Supp. 1457) promulgated under the authority of Executive Order No. 9063, February 16, 1942 (7 F. R. 1075, 3 C. F. R. Cum. Supp. 1093).[1] Executive Order No. 9063 had authorized the Civil Service Commission to prescribe such special procedures as it deemed necessary for the recruitment of personnel by all federal agencies during World War II and provided that persons appointed under such procedures would not acquire classified (competitive) civil service status. Section 17.1 (g), promulgated on April 19, 1943, in turn provided that *all* appointments

[1] The regulations were adopted by the Legal Examining Section of the Civil Service Commission which succeeded the Board of Legal Examiners. E. O. No. 9358, June 20, 1943, 8 F. R. 9175; Civil Service Acts, Rules and Regulations, annotated (amended to October 31, 1943), p. 171.

as attorneys were to be limited to the duration of the present war and for six months thereafter" and that persons so appointed would not "thereby acquire a classified Civil Service status." Respondents' appointments were, consequently, limited to the duration of the war and six months thereafter (R. 41–43) and they did not acquire competitive status.[2] On May 29, 1947, together with eighteen other attorneys, they were notified that, pursuant to a reduction-in-force necessitated by a shortage of funds, they would be separated from the service effective June 30, 1947 (R. 8, 70, 71). The separation was effected in due course (R. 60).

The reduction-in-force was carried out in accordance with the Civil Service Commission Retention Preference Regulations. Those regulations provide, in general, that, for purposes of determining the order in which separation shall be effected, employees shall be divided into three groups—A, B and C—according to tenure of employment. Group A, which has the highest retention priority, is composed of employees with competitive status or, in the case of positions such as that of attorney which are "excepted" from examination requirements, who hold appointments without time limitation. Group B, which has the second highest priority, is composed of

[2] In our brief in No. 474, we discuss respondents' contention that they acquired competitive status. In this case (No. 473), we assume, as the Court of Appeals and the District Court held, that they did not have such status.

employees without competitive status or whose appointments are limited to the duration of the war and six months. Group C has the lowest priority and is composed of employees whose appointments are limited in time to one year or less. Within each group employees are further divided into sub-groups according to veterans' preference and efficiency rating. Thus, sub-groups A–1, B–1 and C–1 are composed of employees with veterans' preference and efficiency ratings of "good" or better, and sub-groups A–2, B–2 and C–2 are composed of employees without veterans' preference with "good" or better efficiency ratings.[3] In accordance with those regula-

[3] The Civil Service Commission "Retention Preference Regulations for use in Reductions in Force," 12 F. R. 2850, § 20.3 provided: "For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

"*Group A.* All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

"A–1 Plus during one-year period after return to duty, as required by law.

"A–1 With veteran preference unless efficiency rating is less than 'Good'.

tions, respondents were classified in Group B, as employees without competitive status holding appointments limited to the duration of the war and six months. They were further classified in sub-group B–1 (R. 44) as veterans with efficiency ratings of at least "good". All of the attorneys retained in the Office of the Solicitor of the Department of Agriculture ranked higher on the retention register; at least some of them were non-veterans with the equivalent of competitive status and classified in sub-group A–2.

Respondents appealed their separation to the Civil Service Commission under Section 14 of the Veterans' Preference Act of 1944 (R. 33). The Commission found (on July 14, 1947, and October 23, 1947) that the action had been taken in conformity with its reduction-in-force regulations and denied the appeals (R. 34, 63). On June 5, 1947, while the appeals to the Commission

---

"A–2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *

"*Group B.* All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

"B–1 With veteran preference unless efficiency rating is less than 'Good'.

"B–2 Without veteran preference unless efficiency rating is less than 'Good'."

* * * * *

The definition of Groups A and B were modified, in respects not material here, on July 4, 1947 (12 F. R. 4365), and, as amended, are set forth in the Appendix, *infra*, pp. 36–37.

were pending, respondents instituted these actions (R. 2, 76).

Some time subsequent to the separation of respondents, additional funds became available to the Department of Agriculture and were allotted to the Office of the Solicitor, and several attorneys who had not been reached for separation resigned (R. 71). Neither of those events could have been foreseen at the time of respondents' separation (R. 72). Thereupon, the Solicitor reemployed nine attorneys, including one veteran, the first of whom took office on October 27, 1947, five months after respondents' notice of separation (R. 72). Several of the attorneys rehired had been separated at the same time as respondents but with inferior positions (sub-group B–2) on the retention register (R. 52). The nine attorneys were selected on the basis of training and experience and their particular suitability for the positions they were to fill (R. 72).

2. Respondents brought these suits claiming in their original complaint (R. 2), filed June 5, 1947, that their preferential rights to retention were violated when non-veterans were continued in employment (R. 5). They asked for a declaratory judgment that their separation notices were invalid and for an injunction against their separation (R. 7). By an amended complaint, filed June 24, 1947 (R. 13), they alleged that they had acquired competitive status (R. 15) and asked, in

addition to the relief previously requested, for a declaratory judgment that they had acquired such status (R. 25) and a mandatory injunction restoring them to their former positions (R. 24). On August 15, 1947, the Secretary[4] moved for summary judgment on the ground that respondents had not acquired competitive status and had been separated in accordance with applicable civil service regulations (R. 32). On March 8, 1948, respondents filed an "Amended and Supplemental Complaint" (R. 49) in which they alleged that the reemployment of the B–2 attorneys separated with them (*supra*, p. 7) was a violation of their rights. It is not at all clear whether respondents intended to allege the reemployment of the B–2 attorneys as a violation of their reemployment rights, or as a violation of their retention rights on the theory that the reduction-in-force was not made in good faith.[5] In any event, the argument

[4] The Secretary of Agriculture is petitioner in No. 473 and respondent in No. 474. To avoid confusion he is referred to as "the Secretary," in both this brief and that in No. 474.

[5] Nowhere in paragraphs 29–35 of the "Amended and Supplemental Complaint," which were relied on by the Court of Appeals as sufficient allegation of violation of reemployment and reinstatement rights, do the words "reinstatement" or "reemployment" appear. On the other hand, Paragraph 35 seems to contain a specific allegation that the reduction-in-force was not in good faith, and paragraph 33 alleges the reemployment of B–2 attorneys as a violation of respondents' retention rights. The allegation that the reduction-in-force was not in good faith is manifestly frivolous and has not been urged in this Court in No. 474, nor was it urged in the Court of Appeals. The budget of the Solicitor's Office was

before the District Court was concerned only with the questions of respondents' retention rights and their competitive status.

The Secretary renewed his motion for summary judgment (R. 69) and also moved to strike from the "Amended and Supplemental Complaint" the paragraphs in which respondents alleged the reemployment of B–2 attorneys as a violation of their rights. The District Court, in an informal memorandum, found that respondents did not have permanent civil service status, and had been separated "in full compliance with the applicable statutes and regulations", and granted the Secretary's motion for summary judgment (R. 72). The District Court did not act on the Secretary's motion to strike, and apparently did not consider any question of discrimination in reemployment. Similarly on appeal, the only issues argued and briefed pertained to respondents' status and the validity of their separation and not to their reemployment rights.

The Court of Appeals agreed that respondents did not have competitive status and that their separation was proper (R. 90–92), but it reversed the decision below on the ground that Section 2 and the reduction-in-force regulations

---

cut more than 10%, and, during the course of 1947, 60 attorneys were discharged and more down-graded. The attorneys discharged included all but one "B" group attorney (a P–8) and a large number of A group attorneys.

under Section 12 of the Veterans' Preference Act of 1944 created rights to "reinstatement and reemployment" which "were violated * * * when other attorneys, classified in a lower subgroup than B–1, who had been released with [them], were reemployed" (R. 93). Since the district court had granted the Secretary's motion for summary judgment, the cases were remanded for determination of the single factual issue of the reemployment of the B–2 attorneys (R. 95).

The Government filed a petition for a rehearing (R. 97) on the ground that the issue of reemployment had not been argued by the parties and that the scope of reemployment preference was prescribed in Section 15 of the Act, which had not been briefed by the parties or discussed by the Court, and not by Section 2 or Section 12. The petition requested the Court, in the event rehearing was not desired, to modify its opinion to direct the District Court to hear only the question of compliance with the statutory provisions and regulations dealing with reemployment preferences (R. 99). The petition for rehearing was denied (R. 100).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding that Section 2 of the Veterans' Preference Act of 1944, without more, conferred specific preference benefits.

2. In holding that respondents' preference in reemployment and reinstatement was violated when persons lower ranking on the *retention* register were reemployed.

3. In holding that veterans' preference in reemployment is to be measured by the standards established for retention in employment under Section 12 of the Act rather than by the standards of Section 15 dealing specifically with reemployment.

4. In failing to consider Section 15 of the Act in determining the scope of preference in reemployment.

5. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

Relying upon the general language of Section 2 of the Veterans' Preference Act (*infra*, p. 27), to the effect that "preference shall be given" honorably discharged veterans "in certification for appointment, in appointment, in reinstatement, in reemployment, and in retention," as granting specific preference benefits, the court below applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 (*infra*, p. 30) as the measure of the veterans' *reemployment* rights. In reaching its decision, the court completely ignored Section 15 of the Act (*infra*, p. 31) where Congress carefully delimited the scope of the veterans' reemployment rights. The effect of the

holding is to substitute for the statutory and administrative measure of veterans' reemployment rights the completely different standards established by statute and regulation with respect to retention in employment.

The basic error leading the Court of Appeals to this anomalous result is its failure to recognize that Section 2 does not confer specific preference benefits. That provision does no more than declare a general policy and enumerate the classes of persons to whom, and the classes of situations in which, "preference" is to be accorded. The later sections of the Act prescribe the scope of the "preference" in the various employment situations, such as appointment, retention, or reemployment, and authorize the Commission to administer and enforce these rights. Section 2 certainly does not permit the courts to draw new and additional rights, not authorized by Congress or the Commission, out of the general phrase "preference shall be given."

In addition to misreading the statute and misapplying the regulations, the decision of the court below upsets long-standing policies of the Civil Service Commission and introduces uncertainty and confusion into the administration of federal employment.

ARGUMENT

Respondents contend in No. 474 that they were improperly separated and make several argu-

ments to support their position. We shall answer those arguments in our brief in that case. For the purposes of our argument here we assume, in accordance with the holding of the court below, that they were properly separated, and consequently direct our argument solely to the question of their reemployment rights. We contend that respondents' preference in reemployment depends exclusively on Section 15 of the Veterans' Preference Act and the Civil Service regulations promulgated under Section 15, and that any rights respondents may have by virtue of Section 12 relate only to separation during a reduction-in-force, and, accordingly, are not relevant here. Since there has been no allegation that their rights under Section 15 were violated, nor any consideration of that section by the courts below, we submit that the judgment of the Court of Appeals was erroneous.

I

SECTION 2 OF THE VETERANS' PREFERENCE ACT MERELY DECLARES A POLICY OF PREFERENCE AND DOES NOT, WITHOUT REFERENCE TO SUBSEQUENT SECTIONS, GRANT SPECIFIC PREFERENCE BENEFITS

Section 2 of the Veterans' Preference Act (*infra*, p. 27) which the court below assumed conferred specific preference benefits, does no more than declare a general policy of preference and enumerate the classes of persons to whom, and the classes of situations in which, preference is to be given. See *Mitchell* v. *Cohen*, 333 U. S.

411.[5] The structure of the statute makes unmistakably plain the intention of Congress, first in Section 2, to describe the persons entitled to its benefits, and, then, in subsequent sections, to prescribe the scope of "preference" in the various employment situations. Throughout the legislative history of the Act, Section 2 was regarded as simply "defining the various groups to whom preference [was] to be granted." H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 2.[7] Discussion of Section 2 was concerned solely with the groups to be given preference.[8]

The later sections of the Act define the substance of "preference" with respect to appointment, retention, reinstatement and reemployment.

---

[5] In the analogous situation prior to the passage of the 1944 Act it was occasionally contended that the existing statutes, which like Section 2 declared a general policy of preference, gave veterans an absolute right to be employed and retained. The contentions were rejected. *Keim* v. *United States*, 177 U. S. 290 (inefficient veteran may be discharged); *Love* v. *United States*, 108 F. 2d 43, 46–48 (C. A. 8), certiorari denied, 309 U. S. 673.

[7] Substantially identical language was used by Representative Starnes, the author of the bill, in explaining the bill in the House, 90 Cong. Rec. 3503, 78th Cong., 2d Sess., and during the Senate hearings on the bill. Hearings before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess., p. 9.

[8] For example, the so-called LaFollette amendment which would have extended derivative preference to husbands of service-disabled women. Such a provision was included in the House version but was removed by the Senate. 90 Cong. Rec. 5784–5, 78th Cong., 2d Sess.

Under the statutory scheme, Sections 7 (*infra*, p. 28) and 8 (*infra*, pp. 28–30) prescribe the preference to be accorded a veteran in certification for appointment and reappointment, Section 12 (*infra*, pp. 30–31) in retention, Section 13 (*infra*, pp. 31–32) in reinstatement after resignation, dismissal or furlough, and Section 15 (*infra*, p. 31) in reemployment after separation without fault.[9] The extent of preference afforded veterans by the various sections is different for each employment situation involved.

Under Sections 7 and 8, governing original appointment, the veteran is entitled to have five points, or in the case of a disabled veteran ten points, added to his score on examination. His name is then placed on the appropriate civil service register in accordance with his augmented rating. When an appointing officer wishes to fill

[9] The other sections of the Veterans' Preference Act deal with the following matters: Section 1—title; Section 3—additional credits, on examinations, for veterans; Section 4—credit for military service; Section 5—waiver of physical and educational qualifications; Section 6—exemption of veterans from restrictive laws as to geographical apportionment, etc.; Section 9—selection of veterans in the unclassified civil service; Section 10—periodic examinations to be held by the Civil Service Commission; Section 11—Civil Service Commission to issue rules and regulations; Section 14—procedure on discharge or separation of veterans; Section 16—rights of preference eligibles who have resigned; Section 17—definition of "Civil Service Commission"; Section 18—repeal of inconsistent laws; Section 19—Civil Service Commission to make and enforce rules; Section 20—separability provision. See 5 U. S. C. 851–869.

937124—51——3

a position he notifies the Civil Service Commission which certifies to him at least three names from the top of the register. The appointing officer must appoint one of the three persons so certified but need not choose the eligible whose name is first on the list even if the latter is a veteran. If, however, he passes over a veteran in favor of a non-veteran he must furnish, in writing, to the veteran and the Commission a statement of his reasons for passing over the veteran. The Commission must pass on the sufficiency of those reasons.

Section 12 provides that in a reduction-in-force veterans with efficiency ratings of "good" or better shall be retained in preference to *competing* employees. The areas of competition are left to Civil Service regulations "which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings." Section 13 provides that a preference eligible who has resigned or been dismissed or furloughed *may* be appointed to any position in the federal service for which he is eligible. The preference in reinstatement afforded a veteran under Section 13 is that he may be reinstated without regard to time limitations, which is not true in the case of non-veterans. Section 15, governing reemployment, provides that, upon application, a veteran who has been separated without fault is to have his name placed on all registers and/or employment lists for which he has eligibility.

He is then to be appointed in accordance with the provisions of Sections 7 and 8 governing original appointment, provided that where a reemployment list contains the names of three or more preference eligibles, no appointment, except of a ten-point preference eligible, may be made from an examination roster.

The extent of preference in a particular situation, therefore, cannot be determined without reference to the appropriate sections of the Act, and reemployment rights cannot be ascertained by examining the standards for retention preference promulgated under Section 12. In holding that Section 2, by itself, confers preference benefits—without regard to the later specific provisions of the Act—the Court of Appeals unnecessarily opens the door to boundless confusion in the entire field of veterans' preference in the federal service. If the definition of the scope of "preference" is not to be found in the sections dealing with the particular aspects of employment, or if Section 2 is held to grant benefits over and above those allowed by or under the specific provisions, the Civil Service Commission, the employing agency, and the veteran himself can have no reliable guide to the meaning of "preference" in a particular situation. A series of supposed preference rights will be drawn out of the general terms of Section 2, and the courts will presumably have to pass upon each

claim, without light from Congress or the Commission. It seems plain, however, that, far from being designed as a declaration of "preference" policy to be implemented by the courts, the Veterans' Preference Act, as a whole, was intended to be, in part, a detailed code of preference rights, and, in part, an authorization to the Civil Service Commission to add to, and further define, those rights. The statute was the culmination of a long history of Congressional and administrative concern with veterans' rights in the civil service, and was enacted against that background. It would be most astonishing, therefore, if the general and introductory phrases of Section 2 were designed to authorize the courts to erect and establish, without legislative or executive guidance, new and additional preference rights.[10] See also, Point III, *infra*, pp. 24–26.

The vice of the decision below that Section 2, without more, confers specific preference benefits is perhaps best illustrated, in the present case, by the confusion which has arisen with respect to *reinstatement* rights. The Court of Appeals

[10] In *Hilton* v. *Sullivan*, 334 U. S. 323, neither the Court nor the Government relied on Section 2 as indicating the type of preference to which veterans were entitled in retention in government service and in the working-out of a reduction-in-force. Instead, the nature and scope of the veterans' preference was drawn from Section 12 of the Veterans' Preference Act (dealing with reductions-in-force) and, in part, from Section 8 of the Selective Training and Service Act of 1940.

seems to have regarded reinstatement and reemployment as synonymous; at least, it did not attempt to define either term or differentiate between them. Respondents assert that because Section 2 declares that veterans shall be entitled to preference in reinstatement, and because neither Section 13 nor any other section except Sections 2 and 5 use the word "reinstatement", they are entitled to absolute preference in reinstatement, which they interpret to mean restoration to the jobs from which they were separated. In fact, *reinstatement,* as the word is used in connection with the civil service, is a type of reemployment available only to persons with competitive status. See Civil Service Regulations, Part 7, "Reinstatement," 5 CFR (1949) Part 7 (*infra,* pp. 35–36); Federal Personnel Manual, p. Z1–245. Reinstatement is defined in the Federal Personnel Manual, p. R1–9, as "Reemployment authorized under Part 7 of the Regulations, *on the basis of appointee's competitive status.* [It] also includes reemployment of *employees with competitive status* as a result of appeal from separation, or under CS Reg. 20.9, 20.13, or 20.14." (Italics added.) Since respondents did not have competitive status, reinstatement was not available to them; moreover, the position of attorney is an "excepted" position and appointments of attorneys are not filled by reinstatement. In any case, the preference in reinstatement given by

Section 13 of the statute is that a veteran *may* be reinstated without regard to time limitations, whereas under Part 7 of the Civil Service Regulations reinstatement of non-veterans can only be made within rigid limits (*infra,* pp. 35–36). Whether or not an employee will be reinstated is completely within the discretion of the appointing officer. 24 Op. Atty. Gen. 103, August 27, 1902. Finally, reinstatement does not necessarily mean, and in fact rarely does mean, that an employee is restored to the position from which he resigned or was separated, but simply that a person with competitive status, by virtue of that status, may be appointed to any position in the service for which he is eligible.

It is, then, meaningless to speak of "absolute preference over non-veterans" in reinstatement. Each reinstatement action is discretionary and no employee, veteran or non-veteran, with or without competitive status, has an absolute right to be reinstated. Preference in reinstatement can, therefore, only take the form of a more relaxed standard of eligibility for reinstatement. It is only by restricting the inquiry, as do respondents, to a consideration of Section 2 that it is possible to confuse eligibility for reinstatement with the more substantial rights to reemployment. The sum of respondents' rights to be rehired are contained in Section 15 which specifically deals with the treatment that *must* be accorded a veteran "separated without delinquency or misconduct" on his part.

II

RESPONDENTS' RIGHTS TO BE REHIRED MUST BE TESTED AGAINST THE STATUTORY STANDARD OF SECTION 15, DEALING WITH REEMPLOYMENT, RATHER THAN SECTION 12, DEALING WITH REDUCTION-IN-FORCE.

Once respondents were properly separated in accordance with the procedures specified by the Civil Service Commission's Retention Preference Regulations,[11] their rights to be rehired depended on Section 15, which deals specifically and exclusively with the reemployment preference to be accorded veterans who, like respondents, have been separated from the service without misconduct or delinquency on their part.[12]

The rights of a veteran under Section 15, and the Civil Service Regulations promulgated thereunder, are clearly defined. Since respondents are attorneys, their reemployment rights are governed by Part 21 of the Civil Service Regulations, "Appointment to Positions Excepted from the Competitive Service" (*infra*, pp. 39–45).[13] Under Section 21.6 (b) (1) of those regulations, respondents were entitled, upon request, to have their

---

[11] As stated above (p. 9), both the Court of Appeals and the District Court held that respondents were properly separated under these regulations, and in this brief we assume that to be the case. In our brief in No. 474, we show that the lower courts were correct in this conclusion.

[12] The provisions of Section 7 and 8 dealing with original appointments are incorporated by reference in Section 15.

[13] Similar provision is made for reemployment in competitive positions. 12 F. R. 2832, 5 C. F. R. § 2.107.

names placed on the reemployment list of the agency from which they were separated. The regulations provide (Section 21.5) for a numerical rating of applicants for a position based on an evaluation of their qualifications. In the case of veterans the numerical rating is augmented by five points, or in the case of disabled veterans, ten points. The rank of veterans on a reemployment list is determined by their augmented ratings. Applicants for a position are then to be considered in the order of their rank on the reemployment list. As in original appointment, the appointing officer may consider the three highest ranking names on the list for any vacancy and may pass over a veteran in favor of a non-veteran. If he does pass over the veteran he must inform the veteran, if requested, of the reasons for doing so.

Thus, the veteran's right to reemployment under Section 15 is a very different thing from the absolute preferential right to which respondents are entitled under the holding of the court below. In reaching its decision, the court below completely ignored Section 15. Instead, it held respondents' rights were violated when they were not rehired in inverse order of their discharge. In effect, the court below substituted for the statutory and administrative measure of veterans' reemployment rights the completely different

standards established by statute and regulation with respect to retention in employment.

Section 12, on which the Court of Appeals relied (R. 91–92), relates only to personnel reductions and the Commission's reduction-in-force regulations, issued specifically under the authority of Section 12, deal exclusively with retention preferences.[14] 9 F. R. 9575; 9 F. R. 13699; 5 C. F. R. (1949) 20.1 *et seq.* (*infra,* pp. 36–38). See *Hilton* v. *Sullivan,* 334 U. S. 323. The rank of respondents, and of the "B–2" attorneys rehired, on the retention register is irrelevant to the question of respondents' reemployment rights. The system of preferences for discharges established by the statute and implemented by the regulations bears no resemblance whatever to that established for reemployment. There is no basis in the statute, or the regulations, for substituting the preferences created in the one employment area for those established in the other. Had the court below tested the respondents' reemployment rights against the statutory standards for reemployment, it would necessarily have reached an opposite result. For there has been no finding, or even an allegation, that the provisions of Section 15 were not followed in these cases.

---

[14] These regulations are described *supra*, pp. 4–6. From their terms, it is plain that they do not apply to reemployment or reinstatement.

III

THE DECISION BELOW OVERRIDES LONG STANDING REGULATIONS OF THE CIVIL SERVICE COMMISSION AND SUBSTITUTES A JUDICIAL SYSTEM OF PREFERENCE REGULATION NOT SANCTIONED BY THE STATUTE

The Veterans' Preference Act was intended, in large part, as a codification of existing Executive Orders and Civil Service Regulations. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3. Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 1; 90 Cong. Rec. 3505. The Act was, it is true, intended to strengthen veterans' preference in several respects, see *Hilton* v. *Sullivan,* 334 U. S. 323, 337, but each enlargement of veterans' rights was carefully noted in the legislative history. Prior to passage of the Act, the kind of preference for which respondents' contend had never existed, and there is nothing in the legislative history which suggests that Congress intended to confer absolute preference in reemployment or to require the Commisison to assimiliate reemployment preference to reduction-in-force preference.[15]

Moreover, the Civil Service Commission was empowered by Section 11 "to promulgate ap-

[15] In explaining Section 15 to the Senate Committee on Civil Service, Mr. Arthur S. Flemming, Civil Service Commissioner, simply said: "Section 15 deals with the establishment of reemployment lists. We have had reemployment lists in the Federal Civil Service for about twenty-five years." Hearings, *supra*, note 7, at p. 30.

propriate rules and regulations for the administration and enforcement of the Act." Pursuant to that power, the Commission has established a comprehensive system of regulations governing veterans' preference in the civil service. Those regulations prescribe in detail the preferential treatment to be accorded veterans in all aspects of employment. Nowhere in the regulations has the Commission provided for absolute preference of veterans over non-veterans. Except in the case of retention (*supra*, pp. 4–6), the regulations do not attempt to prescribe completely the order in which employees are to be affected by personnel actions. Instead, the Commisison has left a certain amount of discretion in appointing officers to choose between a number of eligibles, provided only that if he passes over a veteran he must be prepared to justify his doing so. *Supra*, pp. 15–17, 18–20, 21–22, 23; *infra*, pp. 32 *et seq.*

The Commission's regulations are, of course, entitled to great weight as aids to interpretation of the Veterans' Preference Act, *United States* v. *American Trucking Associations*, 310 U. S. 534. More importantly, however, as regulations of the agency specifically authorized by Section 11 to promulgate regulations and to administer the Act, they must be upheld unless plainly erroneous. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 503; *Helvering* v. *Wilshire*

Oil Co., 308 U. S. 90, 102–103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414. By using the reduction-in-force regulations as a yardstick of reemployment rights, the court below has, in effect, substituted the judiciary for the Commission as the administrator and enforcer of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and the judgment of the District Court affirmed, or, in the alternative, that the case should be remanded to the District Court to receive proof on the issue of compliance with the provisions of Section 15 and the Civil Service Regulations implementing that Section.

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
SAMUEL D. SLADE,
MORTON LIFTIN,
ARTHUR W. MURPHY,
Attorneys.

MARCH 1951.

APPENDIX

A. Statute

The pertinent portions Sections 2, 7, 8, 9, 11, 12, 13, and 15 of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C., Supp. III, 851, and 5 U. S. C. 856, 857, 858, 860, 861, 862, 864), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans'

Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; * * *

* * * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided,* That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification

of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided,* That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification

of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

* * * * *

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose

efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

* * * * * *

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by

any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

B. Regulations

The pertinent portions of the Civil Service Regulations, 5 CFR (1949) Parts 2, 7, 20 and 21, provide:

* * * * *

PART 2—APPOINTMENT THROUGH THE COMPETITIVE SYSTEM

* * * * *

§ 2.107 *Eligible registers.* (a) The names of persons who qualify in competitive examinations shall be entered on appropriate registers in the order of their ratings, as may be augmented by veteran preference, subject to apportionment, residence, or other requirements of law or the Commission's regulations.

(b) When an eligible register has been established as the result of open competitive examination, the names of the following classes of persons may be entered thereon, provided they have a competitive status:

(1) Persons declared eligible by the Commission after appeal from separation

under section 14 of the Veterans' Preference Act;

(2) Veterans who have been furloughed or separated without delinquency or misconduct, or who have resigned from the service, and applied for reentry of their names on such register.

Application for entrance on a register under this paragraph must be filed within 90 days of separation or failure of restoration or reemployment. Applicants shall be examined under the same standards used in the open competitive examination and their names shall be entered on the register in the order prescribed by paragraph (a) of this section.

(c) (1) Veterans who were in the armed forces of the United States subsequent to May 1, 1940, and for that reason lost eligibility on a register during a period that the register was used for probational appointment, shall have their names entered on the appropriate successor register if they:

(i) Have been honorably separated from the armed forces;

(ii) Are still qualified to perform the duties of the position for which the register is used; and

(iii) Make application for entrance on the register within 90 days after separation from active service or from hospitalization continuing after discharge for a period of not more than one year. Such persons shall be restored to the successor register, for the life of such register, in accordance with their former ratings as augmented by preference points, except as provided in subparagraph (2) of this paragraph.

(2) Persons who establish eligibility for entrance on a successor register in accordance with subparagraph (1) of this paragraph, shall have their names entered at the top of the appropriate group on the successor register if another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register. For the purpose of determining the appropriate group all 10-point veterans including such restored veterans, will be considered as one group, and all other eligibles including such restored 5-point veterans, as another group. However, for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, all eligibles will be considered as one group.

(3) Persons who meet the conditions for entrance on a successor register in accordance with subparagraphs (1) of this paragraph shall have their names listed for certification for probational appointment if no successor register exists and another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register.

(4) A person having eligibility under subparagraphs (2) or (3) of this paragraph who, due to disability incurred because of military service in World War II, is unable to perform the duties of the position designated by him at the time of taking the examination for appointment thereto, may upon written request at any time have his name entered upon any list of eligibles for which a like examination is required and shall continue to have the

rights granted by subparagraphs (2) or (3) of this paragraph.

* * * * *

PART 7—REINSTATEMENT

* * * * *

§ 7.101 *General requirements for reinstatement of persons who have competitive status.* (a) A person having a competitive status at the time of separation from the Federal service may be reinstated subject to the following requirements:

(1) Reinstatement must be made within one year of separation if the period of service was less than two years, within two years if the period of service was two years or more but less than three years, within three years if the period of service was three years or more but less than four years, within four years if the period of service was four years or more but less than five years, and without time limitation if the period of service was five years or more.

(2) If separated during his probationary period, reinstatement must be made within one year of separation, but such reinstatement shall be subject to completion of probation and may be made only in the same agency, locality, type of position, and same or lower grade for which he meets the training and experience requirements, except that a probationer separated through reduction in force may be reinstated in any agency and to any position in any locality if he meets the qualifications standards for promotion or reassignment to the position.

(3) Veterans may be reinstated without regard to any time limitations specified in this section.

(4) The qualifications standards of the Commission for promotion or reassignment to the position must be met.

* * * * *

§ 7.104 *Agency authority for reinstatement.* (a) The Commission hereby delegates authority to agencies to reinstate any person who meets the requirements of § 7.101 except where a certificate of the Commission is required by § 7.103 (a), or prior approval must be obtained in cases falling under § 7.103 (b).

(b) The Commission may disapprove any reinstatement, or suspend or withdraw this authority whenever, after postaudit, it finds that the regulations in this part have not been followed.

* * * * *

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE

* * * * *

§ 20.3 *Retention preference*—(a) *Classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil

Service Act and rules, this includes all status and non-status employees currently serving in excepted positions under appointments without time limitation, or all employees who transferred from absolute or probational appointments in the competitive service to war service indefinite or trial period excepted appointments.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating is less than "Good".

A–2 Without veteran preference unless efficiency rating is less than "Good".

A–3 With veteran preference where efficiency rating is less than "Good".

A–4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good".

B–2 Without veteran preference unless efficiency rating is less than "Good".

B–3 With veteran preference where efficiency rating is less than "Good".

B–4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees in the competitive service serving under appointments with definite time limitations imposed in accordance with § 2.114 (c) of this chapter, or in accordance with specific authority of the Commission, all employees in the

excepted service with definite time limitations of one year or less, all noncitizen employees serving within the continental limits of the United States, its territories or possessions, all employees continuing beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good".

C–2 Without veteran preference unless efficiency rating is less than "Good".

C–3 With veteran preference where efficiency rating is less than "Good".

C–4 Without veteran preference where efficiency rating is less than "Good".

* * * * *

§ 20.8 *Sequence of selection.* Within each competitive level, action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy.

* * * * *

PART 21—APPOINTMENT TO POSITIONS EXCEPTED FROM THE COMPETITIVE SERVICE

§ 21.1 *Extent of regulations*—(a) *Positions covered.* The regulations in this part shall apply to all positions (1) in the executive branch of the Federal Government that are excepted from the competitive service; (2) in any temporary or emergency establishment, agency, bureau, administration, project, and department created by acts of Congress or Presidential Executive order which are excepted from the provisions of the Civil Service Act of January 16, 1883; and (3) in the civil service of the District of Columbia. Positions excepted from the competitive service include all positions excepted from the provisions of the Civil Service Act of January 16, 1883, by statute or Executive order, including positions listed in Part 6 of this chapter, positions which may be filled by persons under personal service contract, and positions in Government owned or controlled corporations. The civil service of the District of Columbia includes all positions in the Government of the District of Columbia, and positions under the Board of Education and the Board of Library Trustees of the District of Columbia.

(b) *Applicability.* The provisions of the regulations in this part respecting the examination, rating, and selection for appointment of applicants are required to be followed whenever a qualified person entitled to preference under § 21.2 applies for consideration for appointment. Such provisions may be followed, in the discretion of the agency, in making appointments when no preference applicant applies.

§ 21.2 *Persons entitled to military preference.* In actions taken under the regulations in this part, five-point military preference or ten-point military preference as specified in section 3 of the Veterans' Preference Act of 1944 shall be granted to those persons specified in section 2 of that act. Separation under honorable conditions, as used therein, shall mean any separation from active duty in any branch of the armed forces under honorable conditions. A transfer to inactive status, a transfer to retired status, the acceptance of a resignation, or the issuance of a discharge will be considered as covered by the above definition if such separation was under honorable conditions.

§ 21.3 *Receipt of applications; uniform treatment.* Each agency shall establish definite rules regarding the acceptance of applications for employment in positions covered by the regulations in this part. Such rules shall be made of record in the agency and shall be uniformly applied to all persons who meet the conditions of such rules. Information regarding the rules shall be furnished upon request.

* * * * *

§ 21.5 *Examination of applicants*—(a) *Rating.* The agency may provide for an evaluation of the qualifications of all applicants for a position, who are available under §§ 21.3 and 21.4 at any time prior to appointment being made to such position. Numerical ratings shall be assigned on a scale of 100 and all applicants rated 70 or more shall be eligible for appointment: *Provided,* That no numerical ratings need be assigned whenever all qualified applicants will be offered immediate appointment: *Provided further,* That

whenever there is an excessive number of applicants, only a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable length of time need be given numerical ratings; in such cases the agency shall adopt procedures which will insure consideration of all preference applicants in the order in which they would have been considered if all applicants had been assigned numerical ratings. To the earned numerical ratings of applicants entitled to five-point preference, five points shall be added and to the earned numerical ratings of applicants entitled to ten-point preference, ten points shall be added. A notice of the rating assigned shall be furnished upon request.

No consideration shall be given the application of any non-preference applicant, nor shall such application be rated, for the positions of elevator operator, messenger, guard and custodian as long as qualified applicants entitled to preference are available for such position.

Whenever experience is a factor in determining eligibility, an applicant entitled to five-point or ten-point preference under the regulations in this part shall be credited with time spent in the military or naval service of the United States when the position for which he is applying is similar to that he held immediately prior to his entrance into the military or naval service; credit shall also be given such applicant for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

§ 21.6 *Maintenance of employment lists*—(a) *Establishment of lists.* All ap-

plicants assigned eligible numerical ratings in accordance with § 21.5 shall have their names entered on either (1) the appropriate reemployment list or (2) the appropriate regular employment list. The names of all such applicants shall be entered on said lists in accordance with their ratings, except that the names of applicants entitled to five- or ten-point preference under the regulations in this part shall be entered on such lists in accordance with their respective augmented ratings, and the name of a preference applicant shall be entered ahead of all others having the same rating: *Provided,* That except on lists of applicants for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, the names of applicants entitled to ten-point preference under the regulations in this part shall be placed at the top of the appropriate lists.

(b) *Reemployment list.* The reemployment list will consist of the names of former employees of the agency who are to be considered for future employment, and shall, in any case, include the following:

(1) The names of former employees of the agency entitled to preference under the regulations in this part who have been furloughed or separated without delinquency or misconduct and who apply for reemployment.

(2) The names of any former employees of the agency entitled to preference under the regulations in this part who are found by the Commission, in accordance with § 21.10, to have been unjustifiably dismissed from the agency.

(c) *Regular employment list.* Eligible applicants assigned numerical ratings who are not entered on the agency reemployment list shall be entered on the regular employment list.

(d) *Order of consideration.* (1) The names of all applicants who are assigned eligible numerical ratings for a given position shall, except as provided below for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, be considered either in Order A or in Order B, below:

(i) Order A: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(c) The names of all other qualified applicants on the agency's reemployment lists in the order of their numerical ratings.

(d) The names of all other qualified applicants in the order of their numerical ratings.

(ii) Order B: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants on the agency's reemployment list, in the order of their numerical ratings.

(c) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(d) The names of all other qualified applicants, in the order of their numerical ratings.

(2) The names of all applicants assigned numerical eligible ratings for professional and scientific positions for which the basic entrance salary is over $3,000 per annum shall be considered in the following order:

(i) The names of applicants on the agency's reemployment list, in the order of their numerical ratings.

(ii) The names of all other applicants, in the order of their numerical ratings.

§ 21.7 *Selection and appointment*—(a) *Selection.* In making appointments from employment lists the agency shall make selection for appointment to each vacancy from not more than the highest three names available for appointment in the order provided in § 21.6 (d): *Provided,* That the agency need not accord eligibles on the agency reemployment list the preferential consideration provided in that section for such eligibles if such list contains the names of less than three applicants entitled to preference under the regulations in this part: *Provided further,* That the agency need not consider any applicant who has previously been considered three times, nor any preference applicant who has been disqualified under the provisions of paragraph (b) of this section. The second and any additional vacancies shall be filled in like manner.

(b) *Passing over a preference applicant.* Whenever an agency in making a selection of a nonpreference applicant in accordance with paragraph (a) of this section passes over the name of a preference applicant who, under § 21.6 (d), is entitled to prior consideration, it shall record its reasons for so doing.

A copy of such reasons shall, upon request, be sent to the preference applicant or his designated representative.

When, in making appointments to a position, an agency has on three occasions passed over the name of a preference applicant and recorded its reasons for so doing, consideration of his name for such position may thereafter be discontinued.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1951

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
JAN 29 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

Secretary of Agriculture,

Petitioner,

vs.

Central Roig Refining Company, Puerto Rico Sugar Company, Fajardo Sugar Company, Juncos Central Company, Aguirre Sugar Company, Aguirre Central Corporation, Aguirre Company, Central Aguirre Associates, Central Aguirre Sugar Company, Central Roig Corporation, Central Roig Associates, Central Roig Sugar Company, Central Roig Company, Central Roig, Inc., Central Roig, Ltd., Central Roig, Limited, Central Roig, Limited Company, Central Roig, Limited Corporation, Central Roig, Limited Associates, Central Roig, Limited Sugar Company

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	15-17
Statement	2
Argument	5
1. *Veterans are entitled to reinstatement in civilian positions by reason of violation of their right to preference in reinstatement under Section 2 of the Veterans' Preference Act of 1944*	5
(a) Section 2 designates, prescribes, and defines five specific preferences which shall be given to veterans	5
(b) In enacting Section 2 Congress adopted the known and settled construction of its terms	6
(c) Section 2 embodies the general policy and purpose of the Veterans' Preference Act of 1944	9
(d) The elementary rule requires strict construction of exceptions from the general policy embodied therein	10
(e) Remedial rights and processes may not be disposed of by conjecture	11
Conclusion	14
Appendix	15

CITATIONS.

CASES:

Caminetti v. *United States*, 242 U. S. 470, 485	10
Capital Traction Co. v. *Hop*, 174 U. S. 1, 36	7
Consolidated Edison Co. v. *N. L. R. Board*, 305 U. S. 197, 228	13

Page

Crooks v. *Harrelson*, 282 U. S. 55, 60 14
Evans v. *Jordan & Morehead*, 9 Cranch, U. S., 199, 203 14
Garvey v. *City of Lowell*, 199 Mass. 47, 50, 85 N. E. 182, 183 9
Houghton v. *Payne*, 194 U. S. 88, 100 10
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149, 163 6
McCloskey v. *Willis*, 15 App. Div. 594, 44 N. Y. S. 682 7
Meenaugh v. *Dewey, District Attorney*, 17 N. Y. S. 2d 599, 601 ..... 7, 13
N. L. R. Board v. *Mackay Co.*, 304 U. S. 333, 350 .. 13
People ex rel. Davison v. *Williams*, 213 N. Y. 130, 132, 107 N. E. 49, 50 ..... 7, 8
People ex rel. Shields v. *Scannell*, 48 App. Div. 69, 73, 62 N. Y. S. 682, 683 ..... 7, 13
Piedmont & Northern Ry. v. *I. C. C.*, 286 U. S. 299, 311-312 10
Ransom v. *City of Boston*, 192 Mass. 299, 78 N. E. 481, 484, Id. 193 Mass. 537, 79 N. E. 823, 824 .. 8
Seeley v. *Stevens*, 190 N. Y. 158, 160, 166, 82 N. E. 1095, 1096-1098 7
Spokane & Island R. Co. v. *United States*, 241 U. S. 344, 350 10
State ex rel. Castel v. *Chisholm*, 173 Minn. 485, 217 N. W. 681, 682 9
State ex rel. Tamminen v. *Eveleth*, 189 Minn. 229, 249 N. W. 184, 187 9
Stutzbach v. *Coler*, 168 N. Y. 416, 419-421 7
Stutzbach v. *Coler*, 62 App. Div. 219, 70 N. Y. S. 901, 904-907 7
United States v. *First National Bank of Detroit*, 234 U. S. 245, 262 12
United States v. *Fisher*, 2 Cranch, U. S., 358, 386 14
United States v. *Hartwell*, 6 Wall. 385, 386 ..... 6, 12
United States v. *Lexington M. & E. Co.*, 232 U. S. 399, 409-410 10
United States v. *Pierce Auto Lines*, 327 U. S. 515, 525 13

Page

United States v. *Shreveport Grain & Elev. Co.*, 287 U. S. 77, 83 6
Womsley v. *Jersey City*, 61 N. J. Law, 499, 39 Atl. 710 9

STATUTES 15-17

MISCELLANEOUS:

30 Cong. Record, p. 3502, 78th Cong., March 27, 1944 10
H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2 ..... 9, 10
S. Rept. No. 907, 78th Cong., 2d Sess., p. 2 10
McKinney's Cons. Laws of New York, Ann., Book 9, Civil Service Law, §§ 21, 22 7
Webster's New International Dictionary, 2nd Ed. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 473

CHARLES F. BRANNAN, Secretary, Department of Agriculture,
Petitioner

v.

ROBERT D. ELDER and GREENE CHANDLER FURMAN,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219. The cases were consolidated for hearing in the District Court (R. 84) and were briefed and argued together before the Court of Appeals (R. 88).

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1950 (R. 96). The Government's petition for rehearing, as well as respondents' petition for modification of the opinion and judgment, were denied on October 2, 1950 (R. 100). The Government requested further stay of the mandate, and such stay was later extended to December 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether veterans are entitled to reinstatement in civilian positions by reason of violation of their right to preference in reinstatement under Section 2 of the Veterans' Preference Act of 1944.

2. Whether veterans are entitled to reinstatement in civilian positions by reason of violation of their rights to preference in retention under Sections 2 and 12 of the Act of 1944.

3. Whether veterans are entitled to reinstatement in civilian positions by reason of violation of their right to preference in retention under Section 12 of the Act of 1944.

4. Whether veterans are entitled to reinstatement in civilian positions by reason of their right to preference in retention under the proviso of Section 4 of the Act of August 23, 1912.

STATUTES INVOLVED

Statutes are set out in Appendix, p. 15.

STATEMENT

These actions were brought by respondents who filed complaints on June 5, 1947, seeking retention over nonveterans in a reduction in force (R. 2, 76, 77, 82). After separation effective June 30, 1947 (R. 60), each filed an amended and supplemental complaint on March 8, 1948 (R. 49-58) alleging wrongful acts of petitioner subsequent to the separation and praying reinstatement in his position of Attorney,

Grade P-3, for a declaratory judgment, and other and further relief (R. 58).

The respondents were honorably discharged from the United States Army after wartime service on active duty in the Infantry—Elder during World War I and Furman during World War II (R. 3, 50, 77). Each of them was one of 14,000 lawyers who took and one of 2,000 who passed the competitive civil service examinations, written and oral, given in September, 1942, and January, 1943, for Attorney positions in the classified civil service (R. 15-16, 56-57, 77-78), and as a result each was placed on the register, certified for probational appointment, and appointed from the register (R. 56-57).

Commencing August 1, 1943, each of the respondents was continuously employed from August 1, 1943, through June 6, 1947, in his position of Attorney, Grade P-3, in the Office of the Solicitor, Department of Agriculture, Washington, D. C., and had at all times efficiency ratings of "good" or better (R. 3, 50, 78). On May 29, 1947, each of the respondents received written notice dated May 29, 1947, stating: "A reduction in force brought about by lack of funds necessitates your being separated effective on or after June 30, 1947, c. o. b. Your last day of active duty in your present position will be June 6, 1947" (R. 4, 8, 51). On *July* 30, 1947, petitioner gave each respondent "formal notification of your separation due to reduction in force effective June 30, 1947" (R. 60, 46).

The respondents' positions have not been abolished, but have been filled by other nonveteran Attorneys, Grade P-3, who since June 6, 1947, have been continuously performing work, functions, and duties which were formerly performed by each of the respondents (R. 50-51, 14). There were eight (8) of these nonveteran Attorneys, Grade P-3, each of whom was carried on petitioner's records as "(1) Without veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment with the equivalent of permanent competitive status in the clas-

sified civil service."—and each of whom was assigned *"according to tenure of employment"* to the retention subgroup A-2 of the reduction-in-force regulations (R. 48, 51). At the same time each of the respondent veterans was carried on the petitioner's records as "(1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter."—and assigned *"according to tenure of employment"* to the inferior subgroup B-1 (R. 48, 38-39).

The undenied allegations of the amended and supplemental complaints further plead that soon after the reduction in force said to have been due to lack of funds six (6) other nonveteran Attorneys—who were in the still lower retention subgroup B-2 and who had been released at the same time as respondents—were put back to work and each of them thereafter steadily employed in a position of Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor, Department of Agriculture, Washington, D. C. (R. 52-54, 48). That "The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, subgroup B-2, while defendant excluded plaintiff therefrom, was itself in violation of this plaintiff's [respondents'] superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944, and under Section 4 of said Act of August 23, 1912" (R. 53). Each of the aforesaid six nonveteran Attorneys, Grade P-3, subgrade B-2, is expressly named by the allegations (R. 52).

After hearing the District Court entered summary judgments for the respondent Secretary before answer (R. 74), stating in its memorandum opinion: "It seems clear that plaintiff [respondents] was a war service employee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations." (R. 72).

On appeal the Court of Appeals adhered to the same general thesis (R. 88, 184 F.2d 219), upholding the para-

mount overall retention priority effect given "tenure of employment" by the regulations, and holding that respondent's as veterans' preference employees whose efficiency ratings are "good" or better have no preference over any of the eight nonveterans with classified tenure in retention subgroup A-2 above referred to as retained in preference to the respondent veterans (R. 91-92) either under Section 2 or Section 12 of the Act of 1944, or under the proviso of Section 4 of the Act of August 23, 1912 (R. 91).

However, the Court of Appeals reversed the decision below (R. 96-97), ruling that respondents' rights to the preference in reinstatement under Section 2 of the Act of 1944 were violated (R. 93), that the undenied allegations charge wrongful discrimination against the respondent veterans "in the reinstatement of nonveterans in October, 1947" (R. 94), and that on October 27, 1947, both respondents were wrongfully denied reinstatement (R. 95).

ARGUMENT

1. The Respondent Veterans Are Entitled to Reinstatement in Civilian Positions by Reason of Violation of Their Right to Preference in Reinstatement Under Section 2 of the Veteran's Preference Act of 1944, and the Court of Appeals So Held.

(a) Section 2 designates, prescribes and defines five specific preferences which "shall be given" to veterans.

Section 2 of the Act of 1944 provides that: "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions . . . preference shall be given" to designated categories of veterans, their wives and unmarried widows, in the unclassified civil service as well as in the classified civil service, and in the comprehensive scope throughout the Government therein described and defined.

Petitioner contends that: "Section 2, which the court below apparently assumed conferred specific rights, does

no more than enumerate the classes of persons who shall be entitled to the various employment preferences" (Pet. 7, i.e., *Secretary's Petition*, page 7) and that "The legislative history of the Act establishes beyond question that Section 2 was regarded as simply 'defining the various groups to whom preference [was] to be granted.' " (Pet. 7). The reports of the House and Senate committees and remarks of sponsors of the bill, cited by petitioner, do not sustain these assumptions. In any event, such a twisted paraphrase and repugnant construction would be contrary to the natural import of the terms of Section 2 and inadmissible. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83 where this Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They can not be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve*, but not to *create* an ambiguity.' (cit. cases) Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 386. If the language is clear it is conclusive. There can be no construction when there is nothing to construe.' "

And in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163, the Court said:

> "* * * and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."

(b) In enacting Section 2 Congress adopted the known and settled construction.

In enacting the Veterans' Preference Act of 1944, Congress borrowed and embodied in the primary Section 2 the key and essential provisions of the veterans' statute of the State of New York—"provisions which had received in that state a known and settled construction before their enact-

ment by Congress''—and accordingly, as further stated by this Court:

> ''* * * that [known and settled] construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State.'' *Capital Traction Co.* v. *Hop*, 174 U. S. 1, 36.

The key provisions of the New York veterans' statute are identical with those in the New York Constitution, and each have received the same construction of the same words reading: *''preference shall be given in appointment and promotion.''* Since the year 1900 these provisions have received the known and settled construction to the effect that the sentence italicized, without more, ''creates a preference of retention in employment so long as the positions exist to which they [veterans] have been appointed'' and that ''the right to appointment under such circumstances necessarily carries with it the right to continued employment as against other persons not so protected.'' *Stutzbach* v. *Coler* (1901), 168 N. Y. 416, 419-421, affg. 62 App. Div. 219, 70 N. Y. S. 901, 904-907; *Seeley* v. *Stevens*, 190 N. Y. 158, 160, 166, 82 N. E. 1095, 1096-1098; *People ex rel. Davison* v. *Williams* (1914), 213 N. Y. 213 N. Y. 130, 132, 107 N. E. 49, 50 (Cardozo, J.); *People ex rel. Shields* v. *Scannell*, (1900) 48 App. Div. 68, 73, 62 N. Y. S. 682, 683; *McCloskey* v. *Willis*, 15 App. Div. 594, 44 N. Y. S. 682; *Meenaugh* v. *Dewey, District Attorney*, (1939) 17 N. Y. S. 2d 599, 601; McKinney's Cons. Laws of New York, Ann., Book 9, Civil Service Law, §§ 21, 22.

The aforesaid ''construction . . . together with the text which it expounded'' was affirmed and reiterated by the Court of Appeals of New York in the above cited cases, and is conveniently summarized in the leading case of *Stutzbach* v. *Coler, supra*, (1900) 62 App. Div. 219, 70 N.Y.S. 901, 904-907, where the court said:

"The preference thus intended to be given must be regarded as substantial, and to carry with it every incident necessary to its complete protection and preservation. The preference given in appointment clearly involves in those entitled thereto a right over all other persons not similarly situated. This right, to be of any value whatever, must be a continuing right so long as the position exists to which the veteran is appointed. The purpose of giving him this preference in appointment was to furnish him with employment, and if thereafter he could be immediately discharged, and other persons, not preferred, retained in the position, it is manifest that the intent of the law, which seeks to prefer him, would be entirely defeated. The right to appointment under such circumstances carries with it the right to continued employment as against other persons not so protected."

As said fourteen years later by Mr. Justice Cardozo, speaking for the court:

"It is under that section of the statute that such veterans have been held entitled to preference when a reduction of personnel has become necessary. The determining consideration has been that, to make the preference as to appointment effective, it must be held to be a continuing one during the entire term of service . . . the relator was entitled to reinstatement." *People ex rel. Davison* v. *Williams, supra,* (1914), 213 N. Y. 130, 132, 107 N. E. 49, 50.

The courts of New York are not alone in this construction. In considering regulations based on substantially identical statutory provisions, the Supreme Judicial Court of Massachusetts said:

"* * * they must be so construed as to give to the plaintiff the right to continuous employment in preference to those laborers who were not veterans, so long as there was work to be done of the kind for which he was employed, and as he was competent to perform that work." *Ransom* v. *City of Boston* (1906) 192 Mass. 299, 78 N. E. 481, 484, *id.* 193 Mass. 537, 79 N. E. 823,

824 (1907). See, also *Garvey* v. *City of Lowell* (1908) 199 Mass. 47, 50, 85 N. E. 182, 183; *State ex rel. Castel* v. *Chisholm*, (1925), 173 Minn. 485, 217 N. W. 681, 682; *State ex rel. Tamminen* v. *City of Eveleth* (1933), 189 Minn. 229, 249 N. W. 184, 187; *Womsley* v. *Jersey City* (1898) 61 N. J. L. 499, 39 Atl. 710.

Congress has significantly reinforced the aforesaid, concomitant construction by expressly adding and including in Section 2, among the preferences which "shall be given", the specific preferences (1) in reinstatement, (2) in reemployment, (3) in reappointment, and (4) in certification for appointment—the first three of which it is seen the New York courts had already found it necessary to recognize as existing in the statute and to enforce them although none of these preferences were even mentioned in the New York statute.

In contrast to the confused constructions urged by petitioner, the concomitant construction does not do violence to the phraseology and natural import of the terms used by Congress in Section 2, but makes the natural meaning effective and gives natural and logical sequence to the intention plainly expressed by the language of Section 2.

(c) Section 2 embodies the general policy and purpose of the Act of 1944.

This concomitant construction serves to emphasize the dominant role of Section 2, already indicated by its primary position in the forefront of the Act and by the natural import of its terms. Section 2 not only designates, prescribes, and defines the initial scope of the five specific preferences named therein; it expresses and embodies the general policy and long existing purpose of Congress to grant substantial preference in continued employment in the Government service to the veterans of the Nation's wars and "since the beginning of the Republic to extend certain [*not uncertain and illusory*] benefits to those who have risked their lives in the armed forces during wartime." H. Rept. No. 1289, 78th

Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944; S.Rept. No. 907, 78th Cong., 2d Sess., p.2.

Having thus expressed and embodied such general policy in Section 2, the Congress was of course at liberty further to amend or define, extend or limit each of the five specific preferences by additional provisions in this or other sections. Under existing law, however, each such additional provision is subject to

> "• • • the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312.

(d) The rule requires strict construction of exceptions to general policy.

In applying this elementary rule requiring strict construction of such additional provisions, other fundamental principles are especially applicable. Effect must be given, if possible, to each word in a statute, and the words used by Congress in a statute are presumed to be used in their natural and most ordinary sense, and with the meaning commonly attributed to them. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410; *Houghton* v. *Payne*, 194 U. S. 88, 100.

The preference in *reinstatement* is one of five specific preferences which Congress designates, commands "shall be given", and defines in scope by the provisions of Section 2.

In Section 5 Congress further provides:

> "In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, • • •

Section 5 thus expressly extends the scope of the specific preferences in reinstatemnt, retention, and appointment so that they may partake in the particular benefits of the waivers as to age, height, and weight therein described.

Other than in Sections 2 and 5 *supra*, none of the terms "reinstatement", or reinstate, or instate, occur anywhere else in the Veterans' Preference Act of 1944. It is not to be presumed that this omission was unintentional or accidental. When Congress further defined rights in respect of the preference in reinstatement in Section 5, it did so explicitly, using the Section 2 term "reinstatement" to indicate its intention further to define that specific preference. When it further dealt with the preference in retention in Section 12, it did so explicitly, using the unmistakable term "*shall be retained in preference*". And likewise it referred definitely to "certification" throughout in dealing with the preference in certification for appointment in Section 8.

(c) Remedial rights and processes may not be disposed of by conjecture.

In Section 15 Congress expressly dealt with eligibility for "*recertification and reappointment*". Petitioner insists that under these terms Section 15 "deals specifically with preference in reemployment" (Pet. 2) and, by assumption, that Congress intended by its use of "recertification and reappointment" to delimit or eliminate rights to the specific preference in "reemployment" and also to the specific preference in "reinstatement" (Pet. 2, 8). To acquiesce in such assumptions would be to presume that Congress was indulging in egregious inattention to the striking and essential differences of n[illegible]ural import and practical function existing between each and all of the respective terms used in this statute. [See the appropriate meanings and root-meanings attributed to these words in Webster's New International Dictionary, 2nd Ed.]

The instant case is seen to be one for the often expressed consideration, aiding interpretation, that if a given construc-

tion were intended—i. e. that veterans' rights to the preference in reinstatement granted under Section 2 are to be further defined, limited, or eliminated for all practical purposes under another section of the Act—it would have been easy for the Congress to have expressed such intention in apt terms. *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 262; *United States* v. *Hartwell*, 6 Wall. 385, 386. This the Congress has not done in this statute. Remedial rights and processes may not be disposed of by conjecture. (Cases cited *supra*).

Petitioner argues that the Court of Appeals "reversed the decision below on the ground that Section 2 and the reduction-in-force regulations under Section 12 of the Veterans' Preference Act of 1944 created reemployment rights which 'were violated * * * when other attorneys classified in a lower subgroup than B-1, who had been released with [them] were reemployed' " (Pet. 5), and that the court "applied the standards" of the reduction in force regulations under Section 12 "as the measure of veterans' reemployment rights" (Pet. 6).

On the contrary, in reversing the decision below, the Court of Appeals distinctly and explicitly ruled that it was the respondents' rights under Section 2 of the statute that were violated (R. 93); that the undenied allegations charge wrongful discrimination against the respondent veterans "in the reinstatement of non-veterans in October, 1947" (R. 94); and that on October 27, 1947, both respondents were wrongfully denied reinstatement (R. 95). Moreover, the Court of Appeals ruled that the record does not show that respondents' rights under the reduction-in-force regulations pursuant to Section 12 were violated (R. 92). In view of these definite rulings, further descriptive references to the reinstated nonveterans as in a lower or subgroup B-2 classification under the regulations for retention may not be erected into a ruling that the reduction-in-force regulations under Section 12 created reemployment rights (Pet. 5), or into a ruling that any rights under such regulations were

violated (Pet. 5), or into a ruling that such reduction-in-force regulations under Section 12 are to be applied as the measure of veterans' reemployment rights (Pet. 6). Such descriptive references were manifestly calculated to distinguish the *six* B-2 nonveterans from the *eight* subgroup A-2 nonveterans alleged to have been *retained* since June 6, 1947, in wrongful preference to respondents (R. 51). It is also to be noted that only the specific preference to reinstatement was held by the court to be violated (R. 94, 95).

The undenied allegations above referred to are set out at length by the court in a four-page footnote to the opinion (R. 93-96), and are the same allegations also quoted at length by the Secretary of Agriculture in his motion to strike the same from the amended and supplemental complaint "on the ground that they are immaterial to the issues herein, impertinent and prejudicial" (R. 66-69). This motion to strike was not sustained (R. 72), and the objection was without merit. These allegations fully advised the Secretary of the basis of the complaint against him, gave him actual notice of the issues, and afforded him full opportunity to defend thereon and justify the acts as innocent rather than discriminatory—which is exactly what he tried to do (R. 70-72). His statement here that "the only issues presented related to the validity of respondents' separation" (Pet. 5) is therefore to be regarded as unfounded. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 350; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 228; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 525.

Under the essentially identical provisions of the New York veterans' statute such allegations—i. e. that nonveterans have been employed or reinstated in preference to a released veteran—have for more than forty years been repeatedly recognized as relevant and material as a decisive element in showing the violation of the veteran's rights under the statute. *People ex rel. Shields* v. *Scannell* (1900), 48 App. Div. 69, 73, 62 N. Y. S. 682, 683; *Meenaugh* v. *Dewey* (1939), 17 N. Y. S. 2d 599, 601.

For the foregoing reasons it does not appear that the decision below, insofar as it reverses the judgment of the District Court, should be reviewed because it interprets erroneously the Veterans' Preference Act of 1944 (Pet. 6). Petitioner further argues that such decision below will operate "in a manner which has a very serious impact on the Federal Government's personnel policies and practices" (Pet. 6). But considerations of this nature or of inconvenience can never sanction a construction at variance with the manifest meaning of the Congress, expressed in plain and unambiguous language. *Evans* v. *Jordan & Morehead,* 9 Cranch, U. S., 199, 203; *United States* v. *Fisher,* 2 Cranch, U. S. 358, 386; *Crooks* v. *Harrelson,* 282 U. S. 55, 60.

CONCLUSION

The judgment of the Court of Appeals insofar as it reverses the judgment of the District Court is correct, and within its scope there is no conflict. The petition for a writ of certiorari in Case No. 478 should therefore be denied.

Respectfully submitted,

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Respondents.

January, 1951

APPENDIX TO BRIEF

The Veterans' Preference Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, §§ 851-869) provides in pertinent part as follows:

SEC. 2. In certification for appointment, in appointment, in reinstatement, in re-employment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

* * * * * * * * * * *

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency

ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function of functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

* * * * * * * * * *

SEC. 14. No permanent or indefinite preference eligible who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future employment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right

to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 of this title.

* * * * * * * * * *

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

The proviso of Section 4 of the Act of August 23, 1912, c. 350, § 4, 37 Stat. 413, 5 U. S. C. A. § 648, provides as follows:

Provided, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
MAR 19 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950.

No. 478

CHARLES F. BRANNAN, Secretary of Agriculture, *Petitioner*,

v.

ROBERT D. EDDY AND GERTRUDE CRAWFORD FORMAN,
Respondents.

No. 474

ROBERT D. EDDY AND GERTRUDE CRAWFORD FORMAN,
Petitioners,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

Printed by Byron S. Adams, Washington, D. C.

INDEX

	Page
Opinions Below	1
Cross-Writs of Certiorari	2
Stipulations	2
Statutes and Regulations Involved	61-69
Statement	5
Summary of Argument	14
Argument	15
I. Petitioners' Right to Preference in Retention Was Violated and Wrongfully Denied Since June 6, 1947	15
1. The regulation of the Commission accords no appropriate meaning to the vital proviso of Section 12	15
2. As to the petitioner veterans, the regulation was an unauthorized nullity	21
3. Who are "All other competing employees"?	24
4. The administrative construction was incorrect and not binding on this Court	28
5. Petitioners are entitled to the full measure of the preference in retention granted under the proviso of § 4 of the Act of 1912, as the rights thereunder are broadened and in no respect narrowed by the Act of 1944, and embodied in the Act of 1944	29
II. Petitioners' Right to Preference in Reinstatement Was Violated and Wrongfully Denied Since October 27, 1947	33
1. Section 2 of the Act of 1944 designates, grants, prescribes, and defines five specific preferences which "shall be given" to veterans	33
2. In enacting Section 2 Congress adopted the known and settled construction of its provisions	33
3. Section 2 embodies the general policy and purpose of the Act of 1944	37
4. The rule requires strict construction of any exceptions to the general policy embodied in Section 2 of the Act of 1944	38

Page

5. Petitioners' right to the specific preference in reinstatement under Section 2 was violated 41

III. The Eight Days Notice of Exclusion Was in Violation of Section 14 and Void 44

IV. By Reason of Attorney Positions Being Excepted From Competitive Status Since May 1, 1947, the Release of Petitioners Was in Violation of the Statute and the Regulations for Reductions-in-Force 45

V. Attorney Positions Have Remained in the Classified (Competitive) Civil Service During All Times Since the Issuance of Executive Order No. 8743 of April 23, 1941 45

VI. Petitioners Have Been Entitled to Classified (Competitive) Civil Service Status Since August, 1944 47

Conclusion 60

CITATIONS.

Cases:

Addison v. *Holly Fruit Products Co.*, 322 U. S. 607, 620 60
Alexander v. *Alexandria*, 5 Cranch, 1, 7 30
Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 330-331 28
Bailey v. *Clark*, 21 Wall. 284, 288 30
Blair v. *City of Chicago*, 201 U. S. 400, 475 ..... 30, 32
Brewster v. *Gage*, 280 U. S. 327, 336 28
Caminetti v. *United States*, 242 U. S. 470, 485 ..... 24, 28
Campbell v. *Galeno Chemical Co.*, 281 U. S. 599 27
Capital Traction Co. v. *Hof*, 174 U. S. 1, 36 34
Carolene Products Co. v. *United States*, 323 U. S. 18, 25 34
Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U. S. 238, 242-246 ..... 17, 18, 30
Collett, Ex parte, 337 U. S. 55, 61 ..... 42, 43
Collins v. *United States*, 15 Ct. Cl. 22 40
Colorado v. *Toll*, 268 U. S. 228, 230 .....
Consolidated Edison Co. v. *N. L. R. Board*, 305 U. S. 197, 228 42
Cope v. *Cope*, 137 U. S. 682, 688 30
Cox v. *Hart*, 260 U. S. 427, 435 ..... 17, 19
Dewey v. *United States*, 178 U. S. 510, 520-521 28
Dismuke v. *United States*, 297 U. S. 167, 171 .....
Elder v. *Brannan*, 184 F. 2d 219 1
Ex parte Collett, 337 U. S. 55, 61 ..... 43, 44
Ex parte Public National Bank, 278 U. S. 101, 104 21
Field v. *Clark*, 143 U. S. 649, 692 ..... 21, 27
Garvey v. *City of Lowell*, 199 Mass. 47, 50, 85 N. E. 182, 183 36
Georgia Railroad & Banking Co. v. *Smith*, 128 U. S. 174, 181 ..... 18, 30

Page

Great Northern Ry. Co. v. United States, 315 U. S. 262, 277 30
Henrietta Mining & M. Co. v. Gardner, 173 U. S. 123, 130 34
Hilton v. Sullivan, 334 U. S. 323, 335-339 ..... 15, 16, 20, 21, 22, 27, 28, 29, 59
Houghton v. Payne, 194 U. S. 88, 100 28
International Ry. Co. v. Davidson, 257 U. S. 506, 514 21
Interstate Commerce Commission v. Baird, 194 U. S. 25, 36-37 30
I. C. C. v. Union Pacific R. Co., 222 U. S. 541, 547-548 34
James v. Appel, 192 U. S. 129, 135 34
Joines v. Patterson, 274 U. S. 544, 549 30
Johnson v. Southern Pac. R. Co., 196 U. S. 1, 21 60
Jones v. Securities & Exchange Commission, 298 U. S. 1, 17 43
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 163 28
Kvos, Inc. v. Associated Press, 299 U. S. 269, 279 28
Louisville & N. R. Co. v. United States, 282 U. S. 740, 757, 759 ..... 21, 27, 28
Manhattan General Equipment Co. v. Interstate Commerce Commission, 297 U. S. 129, 134 34
McDonald v. Hovey, 110 U. S. 619, 628-629 ..... 16, 17, 30
McDonald v. United States, 279 U. S. 12, 20-21 35
McCloskey v. Willis, 15 App. Div. 594, 44 N. Y. S. 682 ..... 35, 43
Meenaugh v. Dewey, 17 N. Y. S. 2d 599, 601 34
Metropolitan R. Co. v. Moore, 121 U. S. 558, 572 22
Miller v. Standard Nut Margarine Co., 284 U. S. 498, 508 18
Minis v. United States, 15 Pet. 423, 445 42
N. L. R. Board v. Mackay Co., 304 U. S. 333, 350 21
Panama Refining Co. v. Ryan, 293 U. S. 388, 428 25
People v. Chew, 67 Colo. 394, 179 P. 812, 813 ..... 35, 36
People ex rel. Davison v. Williams, 213 N. Y. 130, 132, 107 N. E. 49, 50 ..... 35, 43
People ex rel. Shields v. Scannell, 48 App. Div. 69, 73, 62 N. Y. S. 682, 683 38
Piedmont & Northern Ry. v. I. C. C., 286 U. S. 299, 311-312 36
Ransom v. City of Boston, 192 Mass. 299, 78 N. E. 481, 484, Id. 193 Mass. 537, 79 N. E. 823, 824 21
Schechter Poultry Corp. v. United States, 295 U. S. 495, 537-538 19
Schlemmer v. Buffalo R. Co., 205 U. S. 1, 10 35
Seeley v. Stevens, 190 U. S. 158, 160, 166, 82 N. E. 1095, 1096-1098 58
Securities & Exchange Commission v. Chenery, 318 U. S. 80, 94-95 38
Spokane & Island R. Co. v. United States, 241 U. S. 344, 350 ..... 18, 30
Springer v. Government of Philippine Islands, 277 U. S. 189, 207 36
State ex rel. Castel v. Chisholm, 173 Minn. 485, 217 N. W. 681, 682 36
State ex rel. Tamminen v. Eveleth, 189 Minn. 229, 249 N. W. 184, 187 35
Stutzbach v. Coler, 160 N. Y. 416, 419-421, 61 N. E. 697 35
Stutzbach v. Coler, 62 App. Div. 219, 70 N. Y. S. 901, 904-907 28
Swendig v. Washington Water Power Co., 265 U. S. 322, 331 .....

Page

Texas & Pac. R. Co. v. United States, 289 U. S. 627, 640 28
Thompson v. United States, 280 U. S. 420, 442 ..... 24, 41
United States v. Babbit, 66 U. S. 55, 61 ..... 18, 30
United States v. Eaton, 144 U. S. 677, 687 21
United States v. First National Bank of Detroit, 234 U. S. 245, 262 ..... 41, 46
United States v. Freeman, 3 How. 556, 564-565 30
United States v. Gerlach Live Stock Co., 339 U. S. 725, 742 28
United States v. Grimaud, 220 U. S. 506, 518 21
United States v. Hartwell, 6 Wall. 385, 386 ..... 41, 46
United States v. La Franca, 282 U. S. 568, 574 32
United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409 ..... 24, 28
United States v. McElwain, 272 U. S. 633 19
United States v. Mescall, 215 U. S. 26, 31-32 24
United States v. Morrow, 266 U. S. 531, 534-535 17
United States v. Pierce Auto Lines, 327 U. S. 515, 525 42
United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83 43
United States v. Standard Brewery Co., Inc., 251 U. S. 210, 217-220 22
United States v. Tanner, 147 U. S. 661 28
United States v. Wickersham, 201 U. S. 390, 394-396 ..... 44, 60
United States v. Whitridge, 197 U. S. 135 .....
Utah Power & Light Co. v. United States, 243 U. S. 389, 410 21
Washington Market Co. v. Hoffman, 101 U. S. 112, 115-116 21
Webster v. Fall, 266 U. S. 507, 511 .....
Weedin v. Chin Bow, 274 U. S. 657, 668 ..... 30, 32
Wetmore v. Markoe, 196 U. S. 28, 76-77 30
Wettre v. Hague, 1 Cir., 168 F. 2d 825, 826 33
White v. United States, 191 U. S. 545, 551 17
Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 307 34
Womsley v. Jersey City, 61 N. J. Law. 499, 39 Atl. 710 36

STATUTES:

Act of August 23, 1912, proviso of Sec. 4, 37 Stat. 413, 5 U. S. C. A. § 648 ..... 3, 4, 29, 30, 31, 32
Civil Service Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. § 632
Sec. 2 ..... 11, 14, 57, 62
Sec. 7 ..... 11, 14, 57, 62
"Ramspeck" Act of November 26, 1940, 54 Stat. 1211, 5 U. S. C. § 631 ..... 11, 14, 46, 47, 48, 57, 63
Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. § 851 et seq.
Sec. 2 ..... 3, 4, 5, 11, 22, 29, 31, 32, 33, 37, 38, 39, 41, 42, 46

Page

Sec. 5 ---- 39
Sec. 12 ---- 3, 4, 5, 11, 15, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 31, 33, 37, 41, 59, 61-62
Sec. 14 ---- 3, 4, 5, 11, 44
Sec. 18 ---- 3, 4, 5, 11, 29, 31, 33
McKinney's Cons. Laws of New York, Ann., Book 9, Civil Service Law, §§ 22, 22 ---- 34-35

EXECUTIVE ORDERS:

EO 8743 of April 23, 1941 (6 F. R. 2117) (1 CFR, Cum. Supp., pp. 927-929) ---- 11, 44, 47, 48, 50, 51, 52, 55, 56, 63
EO 9063 of Feb. 16, 1942 (1 CFR, Cum. Supp., pp. 1091-1092) 51, 52, 53, 54, 55, 56, 67-68
EO 9358 of July 1, 1943 (1943 Supp. CFR, Titles 1-31, pp. 30-31)
EO 9506 of Dec. 12, 1944 (1944 Supp. CFR, Titles 1-10, p. 103) ---- 49

REGULATIONS:

Regulations for reductions-in-force,
§ 20.3 ---- 8-9, 15-17, 26, 45
Regulations of the Board of Legal Examiners.
Sec. 17.1(g) and Sec. 17.2(g) *Procedure prior to the establishment of registers,* [adopted 7 F. R. 2201; repromulgated 8 F. R. 5207-5208 and 5 Code Fed. Regs., 17.1(g) Cum. Supp. 1943] ---- 13, 49, 50, 53, 54, 55, 56, 57, 67
Sec. 17.6 and Sec. 17.8 *Registers of eligibles,* [adopted 8 F. R. 2141; repromulgated 8 F. R. 5207-5208; 5 Code Fed. Regs. 17.6, Cum. Supp. 1943 ---- 11, 14, 47, 48, 50, 52, 53, 57, 65-66
War Service Regulations.
Sec. 18.11 ---- 52, 54, 55, 68
Schedule A of new Civil Service Rules, (§ 6.4, 12 F. R. 2839) ---- 45, 47

MISCELLANEOUS:

House Doc. No. 118, 77th Cong., 1st Sess., *Report of Committee on Civil Service Improvement* ---- 46, 68-69
H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2 ---- 37
S. Rept. No. 907, 78th Cong., 2d Sess., p. 2 ---- 37
30 Cong. Record, p. 3502, 78th Cong., Mar. 27, 1944 ---- 37
H. Rept. No. 633, 62d Cong., 2d Sess., p. 14 ---- 32
S. Rept. No. 832, 62d Cong., 2d Sess., p. 7 ---- 32
H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67 ---- 32
Black's Law Dictionary, 3d Ed. ---- 25, 40
Webster's New International Dictionary, 2d Ed. ---- 25, 40

IN THE

Supreme Court of the United States

October Term, 1950.

No. 473.

CHARLES F. BRANNAN, Secretary of Agriculture, *Petitioner,*

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN, *Respondents.*

No. 474.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN, *Petitioners,*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Respondent.*

On Cross-Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 15, 1950, reversing the judgments of the District Court (R. 96). The petition for rehearing of the appellee Secretary of Agriculture, together with the petition of appellants Elder and Furman for modification of the opinion and judgment, were denied on October 2, 1950 (R. 100). The Secretary requested further stay of the mandate, and such stay was later extended to December 30, 1950. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CROSS-WRITS OF CERTIORARI.

On February 26, 1951, this Court granted a writ of certiorari in No. 473 and also in No. 474. In No. 473 the Secretary petitioned for certiorari, seeking reversal of the judgment of the Court of Appeals. In No. 474 Elder and Furman petitioned for certiorari, seeking relief from that portion of the judgment below which was adverse to them and to enlarge their rights thereunder.

STIPULATIONS.

The separately filed cases of plaintiffs Elder and Furman were consolidated for hearing in the District Court (R. 84) which, before answers, granted the motions of the Secretary for summary judgment on June 22, 1948 (R. 74-75). Plaintiffs appealed, and the cases were briefed and argued together before the Court of Appeals December 7, 1949 (R. 88). The consolidated record on appeal has been designated and agreed upon by all parties (R. 83, 102) with the accompanying stipulation that the material facts in each case are substantially identical and involve identical questions of law (R. 84-85), and that the matters alleged, considered, determined, filed, and done concerning the plaintiff [petitioner] Robert D. Elder shall with like effect be deemed the matters alleged, considered, determined, filed, and done concerning the plaintiff [petitioner] Greene Chandler Furman (R. 85).

Pursuant to such stipulations and to avoid repetitive tautology, the word "petitioner" or the word "plaintiff", where used alone in this Brief, refers to "each of the petitioners" or "each of the plaintiffs".

QUESTIONS PRESENTED.

1. Whether Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [under subgroups A-2, A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [subgroups B-1, C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under §§ 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

2. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are discharged effective June 30, 1947, while other nonveteran nonpreference employees are retained in such positions of Attorney, Grade P-3, in preference to such veterans "according to tenure of employment"—is in violation of retention preference rights of such veterans under applicable statutes aforesaid.

3. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are dropped and excluded from duty since June 6, 1947, while nonveteran employees are retained continu-

ously on active duty in such positions of Attorney, Grade P-3,—is in violation of rights of such veterans under applicable statutes aforesaid.

4. Whether the above-described discharge, dropping, and/or exclusion from duty is to be regarded as in direct violation of the proviso of § 4 of the Act of August 23, 1912, and/or of the proviso of § 3 of the Act of August 15, 1876.

5. Whether, in such a reduction in force, §§ 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

6. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 6, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 6, 1947.

7. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 30, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 30, 1947.

8. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that each of these petitioners has been entitled since August, 1944, to the tenure of employment designated as permanent or classi-

fied (competitive) civil service status, and that such tenure and status has been wrongfully denied him.

9. Whether veterans' preference employees are entitled to reinstatement in civilian positions as of October 28, 1947, by reason of violation of their right to *preference in reinstatement* under Section 2 of the Veterans' Preference Act of 1944—as held by the Court of Appeals (R. 93-95).

10. Whether veterans' preference employees whose efficiency ratings are "good" or better are entitled to reinstatement in civilian positions as of June 6, 1947, by reason of violation of their right to *preference in retention* under Sections 2, 12, 14, and 18 of the Veterans' Preference Act of 1944.

STATUTES AND REGULATIONS INVOLVED.

Are set out in SUPPLEMENT, p. 61.

STATEMENT.

Petitioners were honorably discharged from the United States Army after wartime service on active duty in the Infantry—Elder during World War I and Furman during World War II (R. 3, 50, 77).

Furman was appointed by respondent July 26, 1943 (R. 77) and Elder on August 2, 1943 (R. 3, 50); and from these respective dates each of the petitioners was continuously employed in a civilian position of Associate Attorney, Grade P-3, in the Office of the Solicitor, Department of Agriculture, at Washington, D. C., and each of them had at all times efficiency ratings or "good" or better (R. 3, 50, 78).

The word "petitioner", as hereinafter used, refers to "each of the petitioners". Stipulation, p. 3, *supra*.

Petitioner was one of 14,000 lawyers who took and one of 2,000 who passed the competitive civil service examinations, written and oral, given in September, 1942, and January, 1943, for Attorney positions in the classified civil service

(R. 15-16, 56-57, 77-78), and as a result was placed on the register of eligibles, certified for probational appointment, and appointed from the register by the respondent (R. 56-57). Petitioner satisfactorily completed his probationary year in such position of Attorney, Grade P-3, in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3).

On May 1, 1947, petitioner received written notice of "Conversion to Excepted Appointment (Schedule A-1-4)" (R. 78).

On May 29, 1947, petitioner received written notice dated May 29, 1947, stating:

> "A reduction in force brought about by lack of funds necessitates your being separated effective on or after June 30, 1947, c.o.b. Your last day of active duty in your present position will be June 6, 1947" (R. 4, 8, 51).

On *July* 30, 1947, petitioner received "formal notification of your separation due to reduction in force effective June 30, 1947" (R. 60, 46).

Since June 6, 1947, petitioner has been dropped and excluded from duty in his position of Attorney, Grade P-3, while five women and three men, all nonveterans without veterans' preference, have been retained by respondent in continuous employment on active duty in such positions of Attorney, Grade P-3, since June 6, 1947 (R. 48, 50-51, 23-24). The petitioner's position has not been abolished, but has been filled by such other nonveteran Attorneys, Grade P-3, who since June 6, 1947, have been continuously performing work, functions, and duties which were formerly performed by petitioner (R. 50-51, 14).

Nonveterans retained

A few days after May 29, 1947, the eight nonveteran Attorneys, Grade P-3, above referred to as retained in preference to petitioner, were each carried on respondent's records as "(1) Without veteran preference with efficiency

rating of 'good' or better. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service."—and were assigned *"according to tenure of employment"* to the retention subgroup A-2 of the regulations (R. 48, 51).

At the same time, the petitioner was carried on the respondent's records as "(1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter."—and assigned *"according to tenure of employment"* to the inferior retention subgroup B-1 (R. 48, 38-39).

Nonveterams reinstated

Soon after the reduction in force said to have been due to lack of funds six (6) other nonveteran Attorneys—four women and two men who were in the still lower retention subgroup B-2 and who had been released at the same time as the petitioner—were put back to work by respondent and each of these nonveterans was thereafter steadily employed on active duty with pay in a position of Attorney, Grade P-3, in said Washington office of the Office of the Solicitor, Department of Agriculture, Washington, D. C. (R. 52-54, 48). According to allegations: "The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, subgroup B-2, while defendant excluded plaintiff therefrom, was itself in violation of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944, and under Section 4 of said Act of August 23, 1912" (R. 53). Each of the aforesaid six nonveteran Attorneys, Grade P-3, in subgroup B-2, is expressly named by the allegations (R. 52) which are set out at length by the Court of Appeals in footnote 5 of its opinion (R. 93-96).

Petitioner sued as a plaintiff in District Court June 5, 1947, to enjoin his exclusion from active duty after close of business June 6, 1947 (R. 2, 76, 7, 82). Failing in that, he

filed amended complaint June 24, 1947 (R. 13-28) and amended and supplemental complaint March 8, 1948 (R. 49-58) seeking judicial declaration and enforcement of (1) his right to preference in retention, (2) his right to preference in reinstatement, and (3) his right to classified (competitive) civil service status. The District Court granted the Secretary's motion for summary judgment before answer (R. 74), stating in its opinion: "It seems clear that plaintiff was a war service appointee and did not have permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations." (R. 72).

On appeal, the Court of Appeals adhered to the same general thesis (R. 90-92), expressly approving the classifications and the subgroups of the regulations for reduction in force (R. 91), and holding that "since the appellant [petitioner] was a war service appointee with an efficiency rating not less than 'good', he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service appointees whenever a reduction in force became necessary." (R. 92).

However, the Court of Appeals reversed the judgments below (R. 96-97), ruling that petitioners' rights to the specific preference in reinstatement under Section 2 of the Act of 1944 were violated (R. 93), that the undenied allegations charge wrongful discrimination against the petitioner veterans "in the reinstatement of nonveterans in October, 1947" (R. 94), and that on October 27, 1947, both respondents were wrongfully denied reinstatement (R. 95).

§ 20.3 of the Civil Service Commission regulations (12 F.R. 2850; 5 Code Fed. Regs. § 20.3 Supp. 1947), set out at length by the Court of Appeals in footnote 4 of its opinion (R. 91-93), provides:

> "§ 20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according

to tenure of employment in competitive retention groups and subgroups as follows: * * * "

Group A: All employees with equivalent of permanent or Classified civil service tenure.

Group B: All employees serving under appointments limited to the duration of the present war, or otherwise limited to a period in excess of one year.

Group C: All employees serving under appointments limited to one year or less.

Each Group, in turn, is subdivided into four subgroups

A-1. With veteran preference unless efficiency rating is less than "Good".

A-2. Without veteran preference unless efficiency rating is less than "good".

A-3. With veteran preference where efficiency rating is less than "Good".

A-4. Without veteran preference where efficiency rating is less than "Good".

B-1. With veteran preference unless efficiency rating is less than "Good".

B-2. Without veteran preference unless efficiency rating is less than "Good". * * *

In case of a reduction in force the regulations require (§ 20.8) that within each "competitive level" [e.g. "Attorney, Grade P-3] employees shall be released by starting with the lowest subgroup, C-4, and proceeding upward in inverse order—C-4, C-3, C-2, and so on, releasing all employees in each lower subgroup before proceeding to the next higher subgroup, *et seq.*

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that it does not appear that petitioners' preferential right to be retained was directly violated. (R. 92).

2. In failing to hold that it appears from the undenied allegations that the petitioners' right to preference in retention has been violated during all times since June 6, 1947.

3. In holding that petitioners' preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status (R. 91).

4. In failing to hold that, in such a reduction in force, Sections 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

5. In holding that: "Those classifications and the subgroups into which they were divided, which are reproduced below*, were approved by us in the *Hilton* case. We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 334 U. S. 323 (1948), as holding to the contrary." (R. 91).

6. In holding that each petitioner "was properly classified in Group B and subgroups B-1, a status which gave him the highest preference for retention among all war service [tenure] appointees whenever a reduction in force became necessary." (R. 92).

---

* Referring to the entire text of § 20.3 of the CSC regulations for reductions-in-force.

7. In failing to hold that the Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [as under subgroups A-2 and A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [as in subgroups B-1 and C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under Sections 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

8. In holding that "throughout the period of his employment he [petitioners] was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter". (R. 90-91).

9. In holding that petitioners were and are without classified civil service status (R. 91).

10. In failing to hold that in August, 1944, classified (competitive) civil service status inured to each of the petitioners as a matter of law by reason of the competitive examinations and procedures duly authorized and given effect with respect to petitioners under Sec. 17.8 *Registers of eligibles* (adopted January 30, 1948, 8 F. R. 2141); id. Sec. 17.6 *Registers of eligibles* (repromulgated April 21, 1943, in compendium, 8 F. R. 5207-5208), of the Regulations of the Board of Legal Examiners; under Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117); under authority of the "Ramspeck Act" of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631(a), and the Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, 5 U. S. C. § 632 et seq. (R. 15-16, 55-57).

11. In failing to hold that, if the material allegations in the record remain undisproved, each of the petitioners is entitled to the relief prayed for in his amended and supplemental complaint.

12. In failing to hold that each of the petitioners has been unlawfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947.

13. In failing to hold that the respondent was without authority to impose a limitation "for the duration of the present war and for six months thereafter", or any other time limitation, with respect to the appointment of each of the petitioners to his Attorney position.

14. In failing to hold that, in making any appointment of these petitioners to such Attorney positions in the classified civil service, the respondent was legally required to make, and must be deemed to have made, a probational appointment of each of the petitioners thereto.

15. In failing to hold that during all times after the month of August, 1944, each of the petitioners has been lawfully entitled to permanent civil-service tenure of employment and classified (competitive) civil service status as an employee in the Government service, and lawfully entitled to all rights, privileges, and immunities appertaining to such status.

16. In holding that the appointment of attorneys subsequent to March 16, 1942, was governed by § 17.1(g) of the Regulations of the Board of Legal Examiners (5 Code Fed. Regs. § 17.1, Cum. Supp. 1943). (R. 90).

17. In holding that: "Since the foregoing [§ 17.1(g)] was the regulation in effect at the time the appellant [peti-

tioners] was appointed, his acceptance of employment necessarily was subject to the terms thereof." (R. 90).

18. In failing to hold that both § 17.1(g) and the original § 17.2(g) *Procedure prior to the establishment of registers* (adopted March 16, 1942, 7 F. R. 2201; repromulgated in compendium April 21, 1943, 8 F. R. 5207-5208; 5 Code Fed. Regs. 17.1 Cum. Supp. 1943) were inapplicable, unauthorized, and a nullity.

19. In failing to hold that the eight days notice delivered to petitioners May 29, 1947, of the proposed action of excluding them from duty in their positions from and after June 6, 1947, was in violation of Section 14 of the Veterans' Preference Act of 1944, mandatorily requiring thirty days notice of such action, and that such notice was consequently *void ab initio* and all action pursuant thereto illegal and void.

20. In failing to hold that, all Attorney positions and appointments in the classified (competitive) civil service having been converted to excepted appointments and excepted from competitive status and the Civil Service Act and Rules pursuant to Schedule A of the new Civil Service Rules effective May 1, 1947, the release of petitioners was in violation of statute *and* of the Civil Service Commission regulations for reduction-in-force.

21. In failing to hold that Attorney positions have remained in the classified (competitive) civil service and subject to the Civil Service Act and Rules at all times since the issuance of Executive Order No. 8743 of April 23, 1943.

SUMMARY OF ARGUMENT.

Whether or not possessed of classified (competitive) civil service status, each of the petitioner veterans was wrongfully denied his statutory right to preference in retention and has been wrongfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947. (R. 50-51, 14).

Each of the petitioners was entitled to probational appointment in an Attorney position in the classified civil service by reason of the competitive examinations and competitive procedure duly authorized and given effect with respect to him under the Civil Service Act of 1883, the Ramspeck Act of November 26, 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 and Sec. 17.6 *Registers of eligibles* of the Regulations of the Board of Legal Examiners adopted January 30, 1943, repromulgated in compendium April 23, 1943. (R. 55-57).

Petitioners were each placed on the register of eligibles established in February, 1943, were certified for probational appointment by publication of the register, and were appointed from the register by respondent by reason of the authority aforesaid. (R. 56-57).

Under such authority the respondent was legally required to make and must be deemed to have made a probational appointment of each of the petitioners from the register of Attorney eligibles under which petitioners were mandatorily certified (§ 17.8, §17.6, *supra*) for probational appointment to such Attorney positions in the classified civil service.

Each of the petitioners successfully completed his probationary period of one year in August, 1944, was officially notified thereof by respondent, and during all times thereafter a classified (competitive) civil service status or permanent civil-service tenure of employment inured to each of the petitioners as a matter of law. Effect is thus given to the steps prescribed in the Civil Service Act and implementing Executive orders and regulations. (R. 16, 50, 3).

ARGUMENT.

I.

Petitioner's Right to Preference in Retention Was Violated and Wrongfully Denied Since June 6, 1947.

1. The regulation accords no appropriate meaning to the vital proviso of Section 12.

The first part of the second proviso of Section 12 of the Veterans' Preference Act of 1944 provides:

> "* * * *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

It is the Commission's preoccupation with and fixation upon the first clause of Section 12, as comprising the sole Congressional mandate with respect to veterans' preference in retention, which has resulted in the creation of a regulation out of harmony with the statute. The first clause of Section 12 of the Veterans' Preference Act of 1944 provides:

> "Sec. 12. In any reduction of personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * " (58 Stat. 390, 5 U. S. C. § 861.

From all that appears, the Commission read the first clause, *supra,* and stopped reading at the impact of the first colon. Like Dante's interrupted lovers at Rimini, the Commission closed the book and read no more that day—or ever.

The Commission's 1947 reduction-in-force regulation leads off and follows through by giving paramount overall effect and retention value to the first factor of the gen-

eral terms of the first clause—*"tenure of employment"*—by setting up retention Groups A, B, and C, *"according to tenure of employment"*. The regulation provides:

> "§ 20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows: * * *" (12 F. R. 2850).

The overall effect thus given to the first term of the first clause covers the retention rights of *all* Federal employees —including all the proviso-preferred, proviso-excepted class of veterans, as well as all the nonveteran employees without veterans' preference.

As applied herein, the regulation then attempts to give "due effect" to the four factors or terms of the first clause of Section 12 of the Act of 1944, by first segregating *all* the veteran and nonveteran Attorneys, Grade P-3, in a "competitive level" so designated, who are then "classified according to tenure of employment" among the three overall retention Groups A, B, and C.

"Tenure of employment" is thus given effect as the *overall and paramount criterion* for retention priority by Groups A, B, and C.

Group A. *Permanent or classified tenure of employment* is given supreme effect as the *highest value* in the scale of retention priority, under Group A.

Group B. *War service tenure,* under Group B, and

Group C. *Temporary tenure,* under Group C, follow in descending order of lower retention values.

"Military preference"—under the mis-appellation "Veteran Preference"—is given a very secondary effect and inferior retention value as a sort of minor abscissa within and subordinated to the overall and paramount criterion

of "tenure of employment", e.g. subgroups A-1, A-3, B-1, B-3, C-1, C-3.

"*Efficiency ratings*" are given a staggered abscissa value conjointly with "military preference".

"*Length of service*" is given effect within the subgroups by remote control from § 20.2(b) of the regulations.

The closest scrutiny fails to reveal that any retention value is accorded to *veterans' preference in retention* other than the secondary and minor abscissa value assigned to it in the place and stead of the second term of "*military preference*" in the first clause of Section 12. As above stated, veterans' preference in retention is thus subordinated within and far below the overall and paramount value assigned to the first term of "tenure of employment" in the first clause of Section 12.

But Congress did not stop enacting where the Commission stopped reading and stopped giving effect. The Congress went on to enact the significant part of the section:

> "* * * Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

The closest scrutiny fails to reveal that the seriatim classification scheme of § 20.3, *supra*, takes into account in any way this applicable proviso which, as this Court has recognized, is "the heart of the section". *Hilton* v. *Sullivan*, 334 U. S. 323, 338.

Under the settled general rule established by this Court, this proviso of Section 12 is to be interpreted as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause. *McDonald* v. *United States*, 279 U. S. 20-21; *Cox* v. *Hart*, 260 U. S. 427, 435; *United States* v. *Morrow*, 266 U. S. 531, 534-535; *White* v. *United States*,

191, U. S. 545, 551; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Minis* v. *United States*, 15 Pet. 423, 445; see especially the application of the settled rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

This proviso of Section 12 is also to be regarded as the congressional creation of a class of veterans' preference employees who "shall", if they have the defined efficiency ratings of "good" or better, be retained in preference to all other competing employees without regard to tenure of employment and length of service as between veterans and nonveterans. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36-37; Cf. especially the precise statement and application of this rule in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

In *McDonald* v. *United States*, 279 U. S. 12, 20-21, the Court said:

> "As a general rule, a proviso is intended to take a special class of cases out of the operation of the body of the section in which it is found. (cit. cases) But a proviso is not always limited in its effect to the part of the enactment in which it is found; it may apply generally to all cases within the meaning of the language used." (cit. cases)

In *United States* v. *Babbit*, 66 U. S. 55, 61, *supra*, in determining the effect of a proviso analogous in its relationship to the section in which it was found, this Court said:

> "We are of the opinion that the proviso referred to *is not* limited in its effect to the section in which it is

found, but that it was affirmed by Congress as an independent proposition and applies alike to all officers of this class." [Italics the Court's]

The plain language of the applicable proviso in Section 12, either under the general rule or as an independent proposition, has the effect of a mandate by Congress that any veterans' preference employee whose efficiency rating is "good" or better shall be retained in his position in preference to all other competing employees, without regard to the tenure of employment, the length of service, or the efficiency ratings of any other competing employee or employees. [Who are "all other competing employees", is discussed *infra*]

As many times stated by this Court in applying the general rule:

> "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or to restrain the generality, of the substantive enactment to which it is attached." *Cox* v. *Hart*, 260 U. S. 427, 425, *supra*.

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview." *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, *supra*.

> "The general rule of law is, that a proviso carves special exceptions only out of the body of the act." *Schlemmer* v. *Buffalo R. & Ry. Co.*, 205 U. S. 1, 10.

> "The purpose of the added proviso was to carve out a special class of cases." *United States* v. *McElwain*, 272 U. S. 633.

In making the regulation or "ruling" relied upon by the Secretary, and attacked by the petitioners herein, the Commission granted superior subgroup A-2 retention prefer-

ence to nonveteran nonpreference employees with classified civil service tenure of employment. The Commission made this regulation or "ruling" frankly "according to tenure of employment". *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

At the same time the Commission's regulation or "ruling" assigned inferior subgroup B-1 retention rights to veterans' preference employees whose efficiency ratings are "good" or better, and who were then credited with tenure of employment limited to the duration of the war and six months thereafter. The Commission made this regulation or ruling frankly "according to tenure of employment". *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

This combination "ruling" purported to authorize, and actually resulted in, (1) the exclusion from duty and release of veterans' preference employees whose efficiency ratings are "good" or better, and (2) the continuous retention on active duty of nonveteran nonpreference employees in preference to the aforesaid veterans' preference employees whose efficiency ratings are "good" or better. *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

But Congress, by the above proviso, created and effected a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause of the section in which it is found. Under the settled rule this withdrawal and exception is inclusive of the general term *"tenure of employment"* as well as of the term *"length of service"*. Cases above cited.

2. As to the petitioner veterans, the regulation of the Commission was an unauthorized nullity.

Petitioners are admittedly members of the proviso-preferred, proviso-excepted class of veterans preference employees whose efficiency ratings are "good" or better, to whom the settled rule is applicable (R. 39, 50, 48). The regulation of the Commission which thus gave prohibited effect to the general term of tenure of employment violated the proviso and did not carry into effect the will of Congress as expressed in the statute. As stated by this Court:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws —for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statue, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

See, elaborating on the above: *Field* v. *Clark*, 143 U. S. 649, 692; *United States* v. *Eaton*, 144 U. S. 677, 687; *United States* v. *Grimaud*, 220 U. S. 506, 518; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 410; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537-538; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514.

The Civil Service Commission regulation, applied herein, has not accorded any meaning appropriate to the first part of the second proviso of Section 12, in contravention of the well-established rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex parte Public National Bank*, 278 U. S. 101, 104.

The regulation thereby assumed the legislative power of altering, amending, and modifying this Act of Congress

by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an act of Congress. *United States* v. *Standard Brewery Co.*, 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508. See, also, cases cited *supra*.

In *Hilton* v. *Sullivan*, 334 U. S. 323, 337, the Court's footnote 10 points out that the assignment of employees of classified (permanent) tenure to the "highest retention status" under Group A and the assignment of employees of limited tenures to lower retention status, as under Group B, was "regardless of veterans' preference and of efficiency ratings." In the *Hilton* case, all the employees involved were of classified tenure of employment and only the question of giving effect to "length of service" was presented and decided. Nevertheless, the Court's footnote 10 is indicative of its awareness of the disregard and violation inherent in both the 1943 and 1947 regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenures.

Section 2 of the Act of 1944, in expressing and embodying the general policy and purpose of the Veterans' Preference Act of 1944, commands *inter alia* that preference in retention, in reinstatement, in appointment, etc., shall be given in civilian positions in the *unclassified* civil service as well as in the classified civil service.

This plain command in itself eliminates any apocryphal "construction carried over from the notion that the veterans' preference in retention under the priviso of Section 4 of the Act of August 23, 1912, applied only to the classified civil service, or that it applied only to veterans of classified civil service *status* or tenure of employment. See the many authorities cited and discussed *infra*, buttressing this all but self-evident conclusion.

Section 2 grants and prescribes preference in retention as an absolute grant to four primary classes of veterans,

therein defined. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12, *supra*, Congress further prescribes a single condition which expressly limits, to a special sub-class defined as veterans' preference employees whose efficiency ratings are 'good' or better", the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2. This minimum of "good" efficiency ratings is the only condition prescribed by Congress in Section 2 with respect to the otherwise absolute preference in retention. And the condition is significantly prescribed as a part of the *proviso* which withdraws and excepts this preferred sub-class of veterans' preference employees from the operation and operative effect of the general terms of the first clause relating to tenure of employment as well as length of service.

As pointed out by this Court in connection with the interpretation of the proviso in *Hilton* v. *Sullivan*, *supra*, p. 335, the general term "military preference" in the first clause of Section 12 has a distinctly recognizable function "as between veteran and veteran" in the four successive primary grades of military preference established in Section 2. The general term "military preference" thus serves in the determination of relative retention preference as applied *between veteran and veteran*, in the same manner as tenure of employment, length of service, and efficiency ratings. But it is implicit in the interpretation adopted by this Court in *Hilton* v. *Sullivan* that none of the general terms of the first clause may be given any effect whatever as between veteran and nonveteran, but only as between nonveteran and nonveteran and as between veteran and veteran. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. Thus, as between veterans and nonveterans, the proviso-preferred, proviso-excepted sub-class of veterans' preference employees whose efficiency ratings are "good" or better is in similar fashion withdrawn and excepted from the opera-

tive effect of any higher efficiency ratings possessed by any nonveteran nonpreference employee.

It boils down to this: So long as the efficiency ratings of a veterans' preference employee in a civilian position are "good" or better, that specified efficiency rating is the only condition prescribed by Congress for the absolute retention preference right of that veteran to be retained in that position "in preference to all other competing employees" (Proviso of § 12, *supra*).

3. Who are "All other competing employees?"

There is nothing esoteric about this phrase or any of the words in it. Nor is there anything ambiguous about the first part of the second proviso of Section 12.

In addition to embodying the absolute command and absolute retention preference contained in the 1912 Act, as pointed out by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 338-339, and functioning as a special withdrawal and exception from the operative effect of the general provisions of Section 12 relating to tenure of employment and length of service, these plain words of the second proviso speak for themselves.

Under elementary principles the intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. *Thompson* v. *United States*, 280 U. S. 420, 442. The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

"*All other competing employees*" thus refers to and means all competing employees "*other*" than preference employees. *United States* v. *Mescall*, 215 U. S. 26, 31, 32. This meaning is unnecessarily corroborated by the correla-

tive use of the words "competing nonpreference employees" in the next ensuing sentence of the second proviso of Section 12.

According to *Black's Law Dictionary, 3d Ed: "Compete.* To contend emulously, to strive for the position for which another is striving." The author cites a decision involving civil service positions. *People* v. *Chew,* 67 Colo. 394, 179 P. 812, 813.

"Competing" in its natural import and usual and most ordinary sense according to *Webster,* means "seeking or striving for the same thing, position or reward for which another is striving", to-wit, as here the position of Attorney, Grade P-3, occupied by each of the petitioners and in which each has been wrongfully displaced in favor of other employees "competing" for the position petitioners are striving to regain.

Bearing in mind the word *"other"* in this connection, any employee who is other than a veterans' preference employee whose efficiency ratings are "good" or better, and who is serving as an Attorney, Grade P-3, or who is ready and willing to be appointed or to serve in such position, falls within the natural meaning of other employees competing for the position of Attorney, Grade P-3, against these petitioners. *People* v. *Chew, supra.* Thus the term "all other competing employees used in Section 12 of the Veterans' Preference Act of 1944, as applicable in the instant case, refers to and means all employees other than veterans' preference employees whose efficiency ratings are "good" or better serving in positions of the same grade of Attorney (Grade P-3) as occupied by such veterans' preference employees, and also refers to and means all such nonveteran employees who are ready and willing to be appointed to or serve in such a position. All these employees fall within the natural import and usual and most ordinary sense of the words all other employees "competing" for such positions against the petitioner veterans.

The Court of Appeals rejected the foregoing elementary considerations and held that "the term 'competing employees' used in § 12 of the Act refers to employees competing within the bounds of such classifications as the Commission might establish by regulations" (R. 91); that "Those classifications [of the CSC regulation, § 20.3 *supra*] and the sub-groups into which they were divided . . . were approved by us in the *Hilton* case" (R. 91-92); and that "It results that since the appellant [petitioner] was a war service appointee with an efficiency rating of not less than "good", he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service employees when a reduction in force became necessary." (R. 92).

These holdings were in error. They amount to a holding that the statute means that veterans' preference employees whose efficiency ratings are "good" or better shall *not* be retained in preference to all other competing employees, but shall be retained in preference to only those competing employees who have the same or an equivalent tenure of employment or who have a lower tenure of employment than such veterans' preference employees.

This would be giving effect to *"tenure of employment"*—one of the general terms of the first clause of Section 12—which is prohibited by the statute with respect to the proviso-preferred, proviso-excepted class of veterans.

It does not avail the Solicitor General to argue here on behalf of the Secretary:

> "The statute provides only that preference employees shall be retained in preference to 'competing employees'. It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners." (Mem. 5-6, No. 474).

If the Commission's "ruling" had been formulated and made applicable only with respect to the retention rights

of "men", in the sense of employees without veterans' preference in retention, and the Commission had not at the same time attempted to apply the ruling to cover veterans as well as nonveterans, justification for it might be both sincerely and soundly urged.

As above indicated, the proviso of Section 12 withdrew from the Civil Service Commission all authority to give any effect to tenure of employment in any situation involving the absolute right to be retained given to a veterans' preference employee whose efficiency ratings are "good" or better.

A fortiori, the Commission was without authority to evade the Congressional mandate by injecting any phase of *tenure of employment* into the natural import and most ordinary sense of the words "all other competing employees" used by Congress in the proviso. When the Commission did so here, it modified, altered, and changed in a radical fashion the natural import and most ordinary sense of the words as well as the meaning commonly attributed to them, thus attempting to usurp the power of legislation, and achieving a regulation which has the effect of nullity with respect to the rights of the proviso-excepted class of veterans. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129, 143, *supra; Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610; *Field* v. *Clark,* 143 U. S. 649, 692, *supra,* and the many other cases above cited in this connection. As succinctly stated by this Court in *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610, *supra:*

> "The limits of the power to make regulations are well settled. (cit. cases) They may not extend a statute or modify its provisions."

4. The administrative construction was incorrect and not binding on this Court.

Counsel for the Secretary argue (Mem. 5, No. 474) that:

"This 'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion' is entitled to great weight." Citing *United States* v. *American Trucking Association*, 310 U. S. 532, 549.

But as said by this Court in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 742:

> "Of course, this Court is not bound by administrative mistakes."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. See, also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143, *supra;* and other cases above cited.

If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 282 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne*, *supra*.

Under the positive language of Section 12, viewed in its significant relation with Sections 2 and 18 of the Veterans' Preference Act of 1944 and the provisions of earlier statutes broadened and in no respect narrowed by the Act of 1944, and embodied therein, *Hilton* v. *Sullivan,* 334 U. S. 323, 335-339, the respondent Secretary was required to retain these petitioner veterans in their positions as Attorneys, Grade P-3; and the Secretary's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

This conclusion is confirmed and fortified by major factors embodied in the Act of 1944.

5. Petitioners have been and continue to be entitled to the full measure of the preference in retention granted under the proviso of §4 of the Act of 1912, as the rights thereunder are broadened and in no respect narrowed by the Act of 1944, and embodied in the Act of 1944.

The Court of Appeals held that: "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91).

This holding of the court below is in error for the following reasons:

Section 2 of the Veterans' Preference Act of 1944 commands that preference in retention shall be given in the unclassified civil service, as well as in the classified civil service. Under long established principles of statutory construction this forthright provision of Section 2 is to be regarded as a legislative recognition and declaration by Congress that the absolute retention preferences of veterans given by the proviso of § 4 of the Act of August 23, 1912, *applied in 1912 and still apply since 1944* with respect to veterans' preference in the *unclassified* civil service, as well as in the classified civil service, and has never been confined in application to the classified civil service or to

veterans of classified civil service status. *Weedin* v. *Chin Bow*, 274 U. S. 657, 668; *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

This proviso of §4 of the Act of 1912 is properly to be interpreted as an independent and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases, persons, or subject-matter within the meaning of the language used in the provision itself. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37.

Accordingly, this Court has interpreted the single sentence of the "1912 provision" as an independent and substantive provision separate from any context of the Section 4 in which it is found. *Hilton* v. *Sullivan*, 334 U. S. 323, 336. The Court said:

> "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran." Id. 336.

It is equally true in the instant case, if irrelevant to the issues in the *Hilton* case, that tenure of employment in no way qualified the preference given the veteran.

This Court has also held that the long standing retention preference of veterans given by Congress in the proviso of

§3 of the Act of August 15, 1876, and greatly strengthened by the proviso of §4 of the Act of August 23, 1912, have been broadened and in no respect narrowed by the Veterans' Preference Act of 1944, and embodied in the Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-339.

It seems very clear that, whatever the scope of veterans' retention preference rights prior to the enactment of the Veterans' Preference Act of 1944, the absolute retention preference rights given by the proviso of §4 of the Act of August 23, 1912, must be deemed to have been broadened by §2 of the Veterans' Preference Act of 1944 to comprise the unclassified civil service and veterans' preference employees of non-classified civil service status, as well as the classified civil service and veterans of classified civil service status.

Pursuant to Section 18 of the Act of 1944 and the above determination of this Court, the Secretary of Agriculture was subject under the second proviso of Section 12 of the Act of 1944 to the embodied import and effect of the absolute 1912 command not to discharge, drop, or reduce in rank or salary any such veteran government employees as these petitioners. And this without reference to any other employees whether "competing" or otherwise and particularly without any interpretation of the language of Section 12 of the Act of 1944 which, as this Court has said:

> "• • • would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel." *Hilton* v. *Sullivan*, 334 U. S. 334 U. S. 323, 337.

The second proviso of Section 12 of the Act of 1944 is also seen to implement the meaning and all-comprehensive scope of the 1912 retention preference in the Government services recognized and declared by Congress in Section 2 of the Act of 1944, i. e. as embracing the *unclassified* civil

service and veterans of unclassified tenure or status. *Weedin* v. *Chin Bow*, and other cases *supra*.

In express terms Section 2 was an absolute command that the veterans preference in retention, reinstatement, appointment, etc., shall be given in civilian positions in the Government services, embracing the *unclassified* civil service, in all-comprehensive categories whether permanent, temporary, or emergency.

The Act of 1912 is accordingly to be read at the present time as though the broadening modification or amendment provided by Section 2 of the Act of 1944 had always been part and parcel of the Act of 1912 from the beginning, *United States* v. *LaFranca*, 282 U. S. 568, 574; and *Blair* v. *City of Chicago*, 201 U. S. 400, 475, where the Court said:

> " • • • the act of 1859 is to be read as if it had originally been in the amended form • • • 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended • • •' A statute which is amended is thereafter to be construed as if the amendment had always been there • • • ".

This Congressional recognition and declaration in Section 2 of the Act of 1944 effectually repudiates any phase of the construction or contention on the part of the respondent that the absolute retention preference given by the 1912 Act applied or applies only to the *classified* civil service and employees of related classified tenure of employment.

In passing, it may be noted that the only actual provision concerning civil service *tenure* or *status* was contained not in § 4 of the Omnibus Appropriation Act of August 23, 1912, but in § 5—or rather in a rider abortively designated as "Section 5" which finally failed of passage and does not appear in the Act as finally enacted, 37 Stat. 360, 413. H. Rept. No. 633, 62d Cong., 2d Sess., p. 14; S. Rept. No. 832, 62d Cong., 2d Sess., p. 7; H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67.

In the premises, the facts alleged by petitioners show that the agency action of appellees in dropping and discharging petitioners was, and continues to be, in direct violation of their legal rights under the applicable statutes as interpreted by this Court, being in direct violation of the positive language of the veterans' provision in § 4 of the 1912 Act, *Wettre* v. *Hague*, 1 Cir., 168 F. 2d 825, 826, as well as of Sections 12, 2, and 18 of the Act of 1944—any regulations or administrative rulings of the Civil Service Commission to the contrary notwithstanding.

II.

Petitioners' Right to Preference in Reinstatement Under §2 of the Act of 1944 Was Violated October 27, 1947, and Since Wrongfully Denied. (No. 473)

1. Section 2 of the Act of 1944 designates, grants, prescribes, and defines five specific preferences which "shall be given" to veterans.

Section 2 of the Act of 1944 provides that: "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions . . . preference shall be given" to four primary classes of veterans in the unclassified civil service as well as in the classified civil service, and in the comprehensive scope throughout the Government therein described and defined.

2. In enacting Section 2 Congress adopted the known and settled construction of its provisions.

In enacting the Veterans' Preference Act of 1944, Congress borrowed and embodied in the primary Section 2 the key and essential provisions of the veterans' statute of the State of New York—"provisions which had received in that state a known and settled construction before their enactment by Congress"—and accordingly, as further stated by this Court:

"• • • that [known and settled] construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36.

In *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307, the Court said:

"The resemblance between the provisions of the Massachusetts statute of 1860 and the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which these statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. (cit. cases) In *Metropolitan Railroad* v. *Moore*, just cited, where provisions of statutes of New York, regulating judicial procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted with those provisions as then understood in New York and already construed by the courts of that State, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia. • • • Similar opinions have been expressed in cases arising in other States under statutes differing in language, but having the same general purpose." (cit. cases)

See application of this rule in *McDonald* v. *Hovey*, 110 U. S. 619, 628-629; *James* v. *Appel*, 192 U. S. 129, 135; *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558, 572; *Joines* v. *Patterson*, 274 U. S. 544, 549; *Henrietta Mining & M. Co.* v. *Gardner*, 173 U. S. 123, 130; Cf. *Carolene Products Co.* v. *United States*, 323 U. S. 18, 25.

The key provisions of the New York veterans' statute are identical with those in the New York Constitution, and

each have received the same construction of the same words therein reading:

> "* * * preference shall be given in appointment and promotion * * *"

Since the year 1900 these provisions have received the known and settled construction to the effect that the sentence italicized above, without more, "creates a preference of retention in employment so long as the positions exist to which they [veterans] have been appointed" and that "the right to appointment under such circumstances necessarily carries with it the right to continued employment as against other persons not so protected." *Stutzbach* v. *Coler* (1901), 168 N. Y. 416, 419-421, affg. 62 App. Div. 219, 70 N. Y. S. 901, 904-907; *Seeley* v. *Stevens* (1907) 190 N. Y. 158, 160, 166, 82 N. E. 1095, 1096-1098; *People ex rel Davison* v. *Williams* (1914), 213 N. Y. 130, 132, 107 N. E. 49, 50 (Cardozo, J.); *People ex rel Shields* v. *Scannell* (1900) 48 App. Div. 68, 73, 62 N. Y. S. 682, *McCloskey* v. *Willis*, 15 App. Div. 594, 44 N. Y. S. 682; *Meenaugh* v. *Dewey, District Attorney*, (1939) 17 N. Y. S. 2d 599, 601; McKinney's Cons. Laws of New York, Ann., Book 9, Civil Service Law, §§ 21, 22.

The aforesaid "construction * * * together with the text which it expounded" was affirmed and reiterated by the Court of Appeals of New York in the above cited cases, and is conveniently summarized in the leading case of *Stutzbach* v. *Coler, supra*, (1900) 62 App. Div. 219, 70 N. Y. S. 901, 904-907, where the court said:

> "The preference thus intended to be given must be regarded as substantial, and to carry with it every incident necessary to its complete protection and preservation. The preference given in appointment clearly involves in those entitled thereto a right over all other persons not similarly situated. This right, to be of any value whatever, must be a continuing right so long as the position exists to which the veteran is appointed. The purpose of giving him this preference

> in appointment was to furnish him with employment, and if thereafter he could be immediately discharged, and other persons, not preferred, retained in the position, it is manifest that the intent of the law, which seeks to prefer him, would be entirely defeated. The right to appointment under such circumstances carries with it the right to continued employment as against other persons not so protected."

Fourteen years later, Mr. Justice Cardozo, then speaking for the Court of Appeals of New York, said:

> "It is under that section of the statute that such veterans have been held entitled to preference when a reduction of personnel has become necessary. The determining consideration has been that, to make the preference as to appointment effective, it must be held to be a continuing one during the entire term of service. * * * the relator was entitled to reinstatement." *People ex rel Davison* v. *Williams, supra,* (1914), 213 N. Y. 130, 132, 107 N. E. 49, 50.

The courts of New York are not alone in this construction. In considering regulations based on substantially identical statutory provisions, the Supreme Judicial Court of Massachusetts said:

> " * * * they must be so construed as to give to the plaintiff the right to continuous employment in preference to those laborers who were not veterans, so long as there was work to be done of the kind for which he was employed, and as he was competent to perform that work." *Ransom* v. *City of Boston* (1906), 192 Mass. 299, 78 N. E. 481, 484, id. 193 Mass. 537, 79 N. E. 823, 824 (1907).

See, also, *Garvey* v. *City of Lowell* (1908), 199 Mass. 47, 50, 85 N. E. 182, 183; *State ex rel Castel* v. *Chisholm* (1925), 173 Minn. 485, 217 N. W. 681, 682; *State ex rel Tamminen* v. *City of Eveleth* (1933), 189 Minn. 229, 249 N. W. 184, 187; *Womsley* v. *Jersey City* (1898), 61 N. J. Law, 499, 39 Atl. 710.

Congress has significantly reinforced the aforesaid known and settled construction of the "*preference in appointment*" by expressly adding to it and including in Section 2, among the preferences which "shall be given" the specific preferences (1) In certification for appointment, (2) in appointment, (3) in reinstatement, (4) in reemployment, and (5) in retention—the last three of which, it has been seen, the New York courts had already found it necessary to recognize as existing in the New York statute and to enforce them although none of these preferences were enumerated or even mentioned in the New York statute.

In contrast to the confused constructions of Sections 2 and 12 of the Act of 1944 urged by respondent, the known and settled construction does not do violence to the plain language and natural import of the terms used by Congress in both Section 2 and Section 12, but makes the natural meaning effective and gives natural and logical sequence to the intention and purpose plainly expressed by the language of Section 2.

3. Section 2 embodies the general policy and purpose of the Act of 1944.

The known and settled construction serves to emphasize the dominant role of Section 2, already indicated by its primary position in the forefront of the Act and by the natural import of its terms. Section 2 not only designates, prescribes, and defines the initial scope of the five specific preferences named therein; it expresses and embodies the general policy and long existing purpose of Congress to grant substantial preference in continued employment in the Government service to the veterans of the Nation's wars and "since the beginning of the Republic to extend certain [*not uncertain and illusory*] benefits to those who have risked their lives in the armed forces during wartime." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944; S. Rept. No. 907, 78th Cong., 2d Sess., p. 2.

4. The rule requires strict construction of exceptions to the general policy embodied in Section 2 of the Act.

Having thus expressed and embodied such general policy in Section 2, reinforced by the known and settled construction of its terms, the Congress was of course at liberty further to amend or define, extend or limit, each of the five specific preferences by additional provisions in this or other sections. Under existing law, however, each such additional provision is subject to

> "* * * the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment." *Spokane & Island R. Co.* v. *United States,* 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311-312.

As hereinbefore indicated, Section 2 grants and prescribes the specific preference in retention as an absolute grant to four primary classes of veterans, therein defined. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12 of the Act of 1944 Congress further prescribes an exception to the general policy and absolute grant embodied in Section 2. By that exception Congress prescribes a single condition which expressly limits, to a special sub-class defined as "preference employees whose efficiency ratings are 'good' or better, the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2.

This exception prescribed with respect to the absolute preference in retention granted by Section 2 expends itself by simply prescribing a limitation of the specific preference in retention to those veterans' preference employees whose efficiency ratings are "good" or better. Such ex-

ception and limitation is explicit, and may not be deemed to extend into unexpressed areas of tenure of employment or length of service. For the exception is subject to the strict construction requiring interpretation so as not to destroy the remedial processes intended to be accomplished by the enactment of Section 2.

The same interpretation is applicable to the specific preference in reinstatement.

The preference in reinstatement is one of the five specific preferences which Congress, designates, grants, prescribes "shall be given", and defines in scope by the provisions of Section 2. In Section 2 this grant of the preference in reinstatement is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In Section 5 Congress further provides:

> "In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, * * * "

Section 5 thus purports to extend, rather than limit, the scope of the specific preferences in reinstatement, retention, and appointment so that they may partake in the particular benefits of the waivers as to age, height, and weight therein described.

Other than in Sections 2 and 5 *supra*, none of the terms "reinstatement" or reinstate occur anywhere else in the Veterans' Preference Act of 1944. When Congress further defined rights with respect to the preference in reinstatement in Section 5, it did so explicitly, using the Section 2 term *"reinstatement"* to indicate its intention further to define that specific preference. When Congress further dealt with and imposed the condition of a "good" efficiency rating upon the previously absolute preference in retention, Congress did so explicitly, using the unmistakable

term "*shall be retained in preference*". And in like manner Congress referred definitely to "certification" throughout in further dealing with and defining in scope the specific Section 2 preference "in certification for appointment.".

In Section 15 Congress dealt with eligibility for "*recertification and reappointment*". The Secretary insists that under these terms Section 15 "deals specifically with preference in reemployment" (Secy. Pet. 2) and, by assumption, that Congress intended by its use of "recertfication and reappointment" to delimit or eliminate rights to the specific preference in "reemployment" and also to the specific preference in "reinstatement" (Secy. Pet. 2, 8). This would mean, of course, to delimit or destroy the remedial processes intended to be accomplished by the enactment of these specific and absolute preferences by Section 2, as though they were one and the same in essential character, described in a surplusage of synonyms.

To acquiesce in such assumptions would be to presume that Congress was indulging in egregious inattention to the striking and essential differences of natural import and practical function existing between each and all of the respective terms meticulously used in this statute. [See the meanings and root-meanings attributed to these words in Webster's New International Dictionary, 2d Ed.]

In *Black's Law Dictionary*, 3d Ed. "*Reinstate*—To place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed. Cit. *Collins* v. *United States*, 15 Ct. Cl. 22. This is a distinctive meaning which under elementary principles we must assume that Congress was using by intention and not at random.

The instant case is seen to be one for the often expressed consideration, aiding interpretation, that if a given construction were intended—i.e. that veterans' rights to the specific preference in reinstatement granted under Section 2 are to be further defined, limited, or eliminated for all practical purposes under another section of the Act—it would have been easy for the Congress to have expressed

such intention in apt terms. *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 262; *United States* v. *Hartwell*, 6 Wall. 383, 386. This the Congress has not done in this statute. Remedial rights and processes may not be disposed of by conjecture. *Thompson* v. *United States*, and other cases cited *supra*.

5. Petitioners' right to the specific preference in reinstatement under Section 2 was violated.

The Secretary argues that the Court of Appeals "reversed the decision below on the ground that Section 2 and the reduction-in-force regulations under Section 12 of the Veterans' Preference Act of 1944 created reemployment rights which were violated * * * when other attorneys classified in a lower subgroup than B-1, who had been released with [them] were reemployed" (*Secretary's Petition*, 5, No. 473), and that the court "applied the standards" of the reduction in force regulations under Section 12 "as the measure of veterans' reemployment rights" (Secy. Pet. 6).

On the contrary, in reversing the decision below, the Court of Appeals distinctly and explicitly ruled that it was the petitioners' rights under Section 2 of the statute that were violated (R. 93); that the undenied allegations charge wrongful discrimination against the petitioner veterans "in the reinstatement of non-veterans in October, 1947" (R. 94); and that on October 27, 1947, both of the petitioners were wrongfully denied reinstatement (R. 95). Moreover, the Court of Appeals ruled that the record does not show that petitioners' rights under the reduction-in-force regulations pursuant to Section 12 were violated (R. 92).

In view of these definite rulings, further descriptive references to the reinstated nonveterans as in a lower or subgroup B-2 classification under the regulations for retention may not be erected into a ruling that the reduction-in-force regulations under Section 12 created reemployment rights (Secy. Pet. 5), or into a ruling that any rights under such

regulations were violated (Secy. Pet. 5), or into a ruling that such reduction-in-force regulations under Section 12 are to be applied as the measure of veterans' reemployment rights (Secy. Pet. 6). Such descriptive references were manifestly calculated to avoid confusion between the *six* subgroup B-2 nonveterans who were *reinstated* in October, 1947, from the *eight* subgroup A-2 nonveterans alleged to have been *retained* since June 6, 1947, in wrongful preference to petitioners (R. 51). It is also to be noted that only the right to the specific preference in reinstatement was held by the court to be violated (R. 94, 95).

The undenied allegations above referred to are set out at length by the court in a four-page footnote to the opinion (R. 93-96), and are the same allegations also quoted at length by the Secretary of Agriculture in his motion to strike the same from the amended and supplemental complaint "on the ground that they are immaterial to the issues herein, impertinent and prejudicial" (R. 66-69). This motion to strike was not sustained (R. 72), and the objection was without merit.

These allegations fully advised the Secretary of the basis of the complaint against him, gave him actual notice of the issues, and afforded him full opportunity to defend thereon and justify the acts as innocent rather than discriminatory—which is exactly what he tried to do (R. 70-72). His statement here that "the only issues presented related to the validity of [petitioners'] separation" (Secy. Pet. 5) are therefore to be regarded as unfounded. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 350; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 228; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 525.

Under the essentially identical provisions of the New York veterans' statute such allegations i. e. that nonveterans have been employed or reinstated in preference to a released veteran—have for more than forty years been repeatedly recognized as relevant and material as a decisive element in showing the violation of the veterans' rights to

such reinstatement under the statute. *People ex rel. Shields* v. *Scannell* (1900), 48 App. Div. 69, 73, 62 N. Y. S. 682, 683; *Meenaugh* v. *Dewey, District Attorney* (1939), 17 N. Y. S. 2d 599, 601.

The Secretary contends that Section 2 "does no more than enumerate the classes of persons who shall be entitled to the various employment preferencs" and that "The legislative history of the Act establishes beyond question that Section 2 was regarded as simply 'defining the various groups to whom preference [was] to be granted'." (*Secretary's Petition* in No. 473, p. 7).

The reports of the House and Senate committees and remarks of sponsors of the bill, cited by the Secretary, do not sustain his contention, which involves a construction of Section 2 contrary to its plain language and meaning and to the natural import of its terms. Reports of committees of the Congress, remarks of sponsors, and other matters incidental to legislative history cannot be resorted to for the purpose of construing a statute contrary to its plain language and meaning or to the natural import of its terms. *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163.

In *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83, *supra*, the Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve*, but not to *create* an ambiguity'. (cit. cases). Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 386: 'If the language is clear it is conclusive. There can be no construction when there is nothing to construe'."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163, *supra*, the Court said:

"* * * and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."

And in *Ex parte Collett*, 337 U. S. 55, 61, this Court said:

"The short answer is that there is no need to refer to the legislative history where the language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of a wholly ambiguous significance may furnish dubious bases for inferences in every direction."

III.

The Eight Days Notice of Exclusion Was in Violation of §14 and Void.

The written notice dated and delivered May 29, 1947 (R. 6, 51-52, 78-80) gave only eight days notice of the proposed action of dropping and excluding plaintiffs from and after June 6, 1947. Such notice and the action taken pursuant thereto were accordingly illegal and *void ab initio* in violation of Section 14 of the Act of 1944 which mandatorily requires that the preference eligible "* * * shall have at least thirty days advance written notice for any such proposed action," to-wit, "furlough without pay" from and after June 6, 1947.

It is immaterial that respondent did not use in his notice of May 29, 1947, the specific expression "furlough without pay". The terms and expression respondent did use plainly expressed an unequivocal intention and purpose not only to place petitioners on furlough without pay, but to make such furlough effective permanently from and after June 6, 1947, designated in the notice as "your last day of active duty in your present position" (R. 8). Cf. *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

IV.

By Reason of Attorney Positions Being Excepted From Competitive Status Since May 1, 1947, the Release of Petitioners Was in Violation of the Regulations for Reduction-in-Force.

1. Cooks, Attorneys, Chinese, Japanese, and Hindu interpreters, et al., were "excepted from the competitive service" by listing on Schedule A of the new Civil Service Rules effective May 1, 1947. (12 F. R. 2839, § 6.4.) On May 1, 1947, the petitioners each received a notice of "Conversion to Excepted Appointment (Schedule A-1-4)". (R. 78.)

2. Being excepted May 1, 1947, from such competitive status in the classified civil service, nonveteran Attorneys in such positions could not thereafter be classified in any superior subgroup A-2 under the effective regulations for reduction-in-force. (§ 20.3, 12 F. R. 2850)

3. The petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, are therefore entitled *under such regulations* effective May 1, 1947, to be retained in preference to the eight nonveteran nonpreference Attorneys, thus erroneously designated A-2 and retained since June 6, 1947, in preference to petitioners (R. 50-51).

V.

Attorney Positions Have Remained in the Classified (Competitive) Civil Service During All Times Since the Issuance of Executive Order No. 8743 of April 23, 1941.

By the terms of the "Ramspeck" Act:

> "* * * the President is authorized by Executive order to cover into the classified civil service * * *"

such Attorney positions. [Act of November 26, 1940, c. 919, § 1, 54 Stat. 1211, 5 U. S. C. § 631(a).]

Expressly pursuant to the above statute, this explicit and specific authority only "to *cover*" was duly exercised by the President under Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117); and by such exercise *the authority granted by the statute was plainly exhausted.*

We are not at liberty to assume that Congress, having by apt words explicitly granted only the authority to "*cover*", intended to grant the further, contrary, and repugnant authority to "uncover" such positions from the classified civil service, either upon a single occasion or repeatedly at the will of the executive. *United States* v. *First National Bank of Detroit,* 234 U. S. 245, 262; *United States* v. *Hartwell,* 6 Wall. 385, 386.

It would thus appear that such Attorney positions have legally remained in the classified civil service into which they were originally "covered" pursuant to the precisely designated and defined Congressional authorization to "cover"—that and no more.

The attention of this Court is invited to the Report of the *Committee on Civil Service Improvement* (1 Cum. Supp. pp. 456-457), and published as House Doc. No. 118, 77th Cong., pertinent excerpts from which are set out in the Supplement to this Brief, p. , *infra.* This Committee, made up of men of distinguished professional attainments, was appointed by the President January 31, 1939, and had a profound influence on the policy underlying the enactment of the "Ramspeck Act" of November 26, 1940, and the formulation of Executive Order 8743. This Report and the legislative history of the Ramspeck Act lead to the conclusion that the underlying intention, policy, and purpose of all concerned in the legislation and proximate administrative steps, were in accord as to the necessity that the legal positions of the Government be made a *career* service—permanent and not casual.

VI.

Petitioners Have Been Entitled to Classified Competitive Status Since August, 1944.

The Attorney position occupied by petitioner was among the positions "covered into the classified civil service" by Executive Order 3743 of April 23, 1941 (6 F. R. 2117) by express authorization of the Ramspeck Act of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631(a), and remained in the classified civil service at least until May 1, 1947, when Schedule A of the new Civil Service Rules included "Attorneys" among "those excepted from the competitive service to which appointments may be made without examination" (12 F. R. 2839).

Petitioner was one of 14,000 lawyers who took and one of 2,000 who passed the competitive civil service examinations, written and oral, given successively in September, 1942, and January, 1943, for Attorney positions in the classified civil service (R. 15-16, 56-57, 77-78). As a result petitioner was placed on the competitive register of Attorney eligibles for probational appointment established in February, 1943, and was officially notified thereof by letter dated February 11, 1943, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (R. 56, 65), which reads in part as follows:

> "Dear Mr. Elder: [id. Mr. Furman].
>
> "I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. • • •
>
> "You may be approached by more than one agency of the Government as a result of your eligibility, • • •"

Petitioner was certified for probational appointment by the publication of this register in accordance with the provisions of Sec. 17.8 of the Regulations of the Board of Legal Examiners (R. 56-57). Sec. 17.8 *Registers of eligi-*

bles was adopted January 30, 1943 (8 F. R. 2141) under authority of Executive Order 8743 of April 23, 1941, and the Ramspeck Act of 1940, *supra*. Sec. 17.8 provides *inter alia* as follows:

> "Sec. 17.8 *Registers of eligibles.* * * * The publication of each register and of the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for appointment from among those included, * * * all appointments to the positions and for the period covered by any register shall be from the register. * * *"

As required by Sec. 17.8, *supra*, petitioner was appointed from the register established in February, 1943 (R. 56-57). The approach, interview, and ensuing appointment of petitioner by respondent was made because of the certification of petitioner to respondent from the aforesaid register in accordance with the requirements of Sec. 17.8; and petitioner was appointed by reason of and pursuant to Sec. 17.8 and the register of 2,000 Attorney eligibles established and administered under Sec. 17.8 *Registers of eligibles*, in effectuation of the competitive purposes and procedures contemplated and provided for in Executive Order 8743 pursuant to the Ramspeck Act of 1940. (R. 57).

Petitioner satisfactorily completed his probationary year in such position of Attorney, Grade P-3, in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3) whereupon in normal course, classified (competitive) civil service status inured to petitioner as a matter of law by reason of the competitive examinations and procedures duly authorized and given effect with respect to him under the aforesaid Sec. 17.8 *Registers of eligibles*, Executive Order 8743, the Ramspeck Act of 1940, and the Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, 5 U. S. C. § 632 et seq. (R. 15-16, 55-57).

Executive Order No. 9506 of December 12, 1944 (1 CFR, Supp. of 1944, p. 103) provides as follows: [The entire text thereof is here set out.]

> "Hereafter no person shall be accorded a classified civil service status on the basis of his name having been reached on a civil service register unless he shall have been regularly selected for appointment from a certificate issued by the Civil Service Commission for probational appointment and shall have entered on duty pursuant to selection from such certificate."

In view of the date of Executive Order 9506, *supra*, the basis of petitioners' classified civil service status was more than currently adequate.

Bypassing the above situation, the Secretary's affiant asserts (R. 36) and the Court of Appeals holds (R. 90) that petitioner's status or tenure was governed by paragraph (g) (5 Code Regs. § 17.1 Cum. Supp. 1943) of the regulations of the Board of Legal Examiners, which the Court of Appeals said was the regulation in effect at the time petitioner was appointed and that: "It follows that throughout the period of his employment he was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter" (R. 90-91). The Court of Appeals also said (R. 90) that the appointment of attorneys subsequent to March 16, 1942, was governed by said regulation. The following is the regulation adopted on March 16, 1942.

§ 17.2 *Procedure prior to the establishment of registers* of the Regulations of the Board of Legal Examiners, adopted March 16, 1942 (7 Federal Register, p. 2201), provides in pertinent part as follows:

> Sec. 17.2 *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appoint-

ments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

On April 21, 1943, the Board of Legal Examiners collected and republished its previously adopted regulations in a sort of connected code, at 8 F.R. 5207-5208.

Duly included therein is Sec. 17.8 *Registers of eligibles,* pursuant to which petitioner was certified for probational appointment under the register of Attorney eligibles established February, 1943, from which petitioner was appointed (R. 56-57, 15). In this collection Sec. 17.8 is renumbered Sec. 17.6 *Registers of eligibles* and comprises the same text and terms as Sec. 17.8 *Registers of eligibles.*

Sec. 17.2 (g) *Procedure prior to the establishment of registers* is included in the collection as Sec. 17.1 (g), embodying the same text and terms as Sec. 17.2 (g) *Procedure prior to the establishment of registers,* and appearing without the subhead "*Procedure prior to the establishment of registers*".

The codification of April 21, 1943, §§ 17.1 to 17.7 was "issued under EO 8743" as authority (8 F.R. 5207).

Thus appearing again on April 21, 1943, in conjunction with Sec. 17.6 *Registers of eligibles* and the continuance in force of Executive Order 8743, it is apparent that the Board of Legal Examiners intended Sec. 17.1(g) and Sec. 17.2(g) *Procedure prior to the establishment of registers* to be applicable only to such procedure *prior* to the establishment of registers and did not intend the same to be applicable to procedure *subsequent* to the establishment in February, 1943, of the register upon which petitioner was included by the Board of Legal Examiners and by which register petitioner was certified for probational appointment and from which register petitioner was selected and appointed (R. 57).

Moreover, the above Sec. 17.1 (g) and Sec. 17.2 (g) *Procedure prior to the establishment of registers,* insofar as they purport to authorize employing agencies to make ap-

pointments limited to the duration of the war and for six months thereafter, were in each instance unauthorized and a nullity—

(1) because such War Service appointments were required by Executive Order 9063 of February 16, 1942, to be effected "solely by reason of any special procedures adopted under authority of this order" to-wit, Executive Order 9063;

(2) because by Executive Order 9063 "The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special procedures as it [alone] may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *";

(3) because the Board of Legal Examiners, an autonomous body created and empowered by Executive Order 8743, was without authority to adopt and prescribe any such special procedures under Executive Order 9063 and possessed under Executive Order 8743 only the specific authority to determine regulations and procedures to effectuate the competitive purposes contemplated and provided for in Executive Order 8743 pursuant to the Ramspeck Act.

The Board of Legal Examiners was explicitly created and empowered by Executive Order 8743 to function as a responsible and autonomous body, obligated only to *consult* with the Civil Service Commission in regard to the Board's own determination and adoption of regulations, but in no way bound by any advice or orders of the Commission in any part of its duties. The Commission was not given any authority by the President with respect to such Regulations of the Board of Legal Examiners.

The Commission recognized this situation and expressly excepted and disqualified its own *War Service Regulations* from any application to or interference with the competitive examinations and competitive procedures being effectuated by the Board with respect to Attorney positions un-

der Executive Order 8743 and the Ramspeck Act—including the future regulations of the Board, such as Sec. 17.8 and 17.6 *Registers of eligibles, supra.*

Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly under authority of Executive Order 9063, prescribed in pertinent part:

> "Sec. 18.11 *Extent of regulations.*—(a) • • • (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

The above Sec. 18.11 of the *War Service Regulations* remained in effect until 1946—long after August, 1944, when petitioner was officially notified of his satisfactory completion of his probationary year of service, whereupon classified (competitive) civil service status inured to him as a matter of law (R. 15-16, 55-57). Accordingly, Sec. 17.6 *Register of eligibles,* Executive Order 8743, the Ramspeck Act, and the procedures pursuant thereto were not subject to the *War Service Regulations* during the normal period of petitioner's competitive examination, certification for probational appointment, probational appointment, official notification of his successful completion of his probationary year, and acquisition of classified (competitive) civil service status.

It has been seen that the *War Service Regulations* were adopted by the Civil Service Commission pursuant to the authority of Executive Order No. 9063 of February 16, 1942, which expressly authorized the Civil Service Commission alone "to adopt and prescribe such special procedures as it may determine to be necessary" in such wartime emergency. The *Board of Legal Examiners* itself had no authority to adopt and prescribe any such special procedures under Executive Order No. 9063 as it erroneously presumed to assert in adopting and prescribing Sec. 17.2 *Procedure prior to the establishment of registers,*

supra. It had only the specific authority to determine regulations and procedures in such manner as to effectuate the competitive purposes contemplated and provided for in Executive Order No. 8743 pursuant to the Ramspeck Act. On the other hand, the Board of Legal Examiners was engaged in the performance of its legitimate and authorized functions when it adopted and prescribed Sec. 17.8 *Registers of eligibles of the Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 F. R. 2141), pursuant to which petitioners were certified for probational appointment, appointed, and acquired classified (competitive) civil service status under the authority of the Ramspeck Act of 1940 and the Civil Service Act of 1883 (R. 55-57).

The significant points appear to be as follows:

I. The Board of Legal Examiners was without authority to determine, adopt, or prescribe any special procedures or regulations under Executive Order 9063 or to provide that any "appointments shall be effected under Executive Order 9063", all of which the Board of Legal Examiners erroneously assumed to do when it promulgated Sec. 17.2 *Procedure prior to the establishment of registers, supra*, on March 16, 1942. The said Sec. 17.2 was therefore a nullity.

II. The Board of Legal Examiners was likewise without authority in assuming to repromulgate, adopt, or prescribe the above Sec. 17.2(g) as Sec. 17.1(g) of the Regulations of the Board of Legal Examiners which the Board promulgated April 23, 1943, in the form of a connected code of previously adopted regulations wherein it used the same text and terms of the former Sec. 17.2(g), but omitted therefrom the subhead caption "*Procedure prior to the establishment of registers*" and promulgated Sec. 17.1(g) without this or any other subhead. As shown under the following points, the Board of Legal Examiners was equally without authority to adopt or prescribe either Sec. 17.2(g) or Sec. 17.1(g). Each and both of such regulations was thus a nullity and furnished no authority for the Sec-

retary's limitation of the petitioners' probational appointments to "War Service Indefinite Appointments" as he erroneously assumed to do under the said Sec. 17.1(g) of the Regulations of the Board of Legal Examiners (R. 36).

III. By the express terms of Executive Order 9063 it is provided:

> "1. The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special proceedures as it [alone] may determine to be necessary * * * for all departments * * *"

IV. By Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly pursuant to E O 9063, *supra*, the Commission prescribed that:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

This War Service Regulation Sec. 18.11 was still in effect until 1946—long after August, 1944, when petitioners were officially notified of their satisfactory completion of their probationary year of service, whereupon classified (competitive) civil service status inured to each of them as a matter of law (R. 15-16, 55-57).

V. By Executive Order No. 9063 it is also expressly provided:

> "2. Persons appointed *solely* by reason of any special procedures adopted under authority of this order to positions subject to the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." [Emphasis supplied]

(a) Petitioners were not appointed *solely*, or at all, by reason of the *War Service Regulations*, for the reason that in Sec. 18.11 thereof, *supra*, the Civil Service Commission explicitly withdrew the *War Service Regulations* from any application to matters connected with the province of the *Board of Legal Examiners*, i.e., recruitment and appointments to Attorney positions and in the classified civil service and matters related thereto.

(b) Sec. 17.2(g) and Sec. 17.1(g), which in terms purported to authorize employing agencies to make appointments limited to the duration of the war and six months thereafter, were unauthorized and a nullity because such appointments were by Executive Order 9063 required to be effected "*solely* by reason of ... special procedures adopted under authority of this order", E O 9063, and in addition the Civil Service Commission itself alone was expressly designated and "authorized to adopt such special procedures" under E O 9063.

(c) Since the President in E O 9063 deemed it advisable and saw fit explicitly to restrict to the *Civil Service Commission*, itself and alone, the authority to adopt and prescribe special procedures, which would confer authority on employing agencies authority to limit appointments, made *solely* by reason of such special procedures, to the duration of the war and six months thereafter, it is not to be presumed that the President intended to clothe any other Commission, officer, or Board such as the autonomous Board of Legal Examiners, with such comprehensive authority to adopt special procedures which would in turn authorize employing agencies to limit probational appointments in the classified civil service to the duration of the war and six months thereafter.

(d) If the Board of Legal Examiners assumed to adopt Sec. 17.2(g) or Sec. 17.1(g) of its regulations partly under E O 8743 and partly under E O 9063, this would not comply with the President's requirement in E O 9063 that only

appointments effected *solely* by reason of such special procedures adopted by the Commission under authority of E O 9063 may, in the discretion of the Commission, be limited to the duration of the war and six months thereafter. Sec. 17.2(g) and Sec. 17.1(g) are not thus to be salvaged from nullity.

(e) The function of effecting limited appointments to Attorney positions in the classified civil service is foreign to and in contravention of the essential purpose and policy of the Ramspeck Act and Executive Order No. 8743, which contemplate and authorize in a very particular sense procedures designed to qualify competitive applicants for probational appointment and classified (competitive) civil service status, on a par with the status enjoyed by other Federal employees.

VI. Executive Order No. 9358 of July 1, 1943, provided that: "Subject to the provisions of this order, Executive Order No. 8743 as amended shall remain in effect." E O 9358 also provided that "until further order the administration of the civil service laws in their application to attorney positions in the classified civil service and to the incumbents of such positions shall vest in the Civil Service Commission. The Commission shall have authority to determine the regulations and procedures governing the recruitment and examination of applicants for attorney positions and the selection, appointment, promotion, and transfer of attorneys in the classified civil service . . . "

(a) It does not appear in the Federal Register or elsewhere that the Civil Service Commission ever adopted any special procedures or regulations with respect to Attorneys or Attorney positions at any time between September, 1942, and August 1944, when petitioners presumably acquired competitive status. Nor does it anywhere appear that the Commission officially adopted the Regulations of the Board of Legal Examiners or officially prescribed any

authority for the utilization of such regulations as regulations of the Commission or otherwise.

(b) It vaguely appears from the averments on behalf of the Secretary that an obscure subdivision, unknown to the Federal Register, or any duly adopted regulation, i. e., a "Legal Examining Section" of the Commission, assumed to act under the above Sec. 17.1(g) of the Regulations of the Board of Legal Examiners and assumed to "authorize" the Office of the Solicitor of the Secretary of Agriculture to appoint each of these petitioners to a * * *

> "War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the Regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July, 1943" (R. 36)

Surely, in a Government of laws, subordinates and personnel clerks of a subdivision of the Civil Service Commission and of an executive Department, assuming to perform official acts under regulations shown to be devoid of appropriate authorization, cannot successfully clothe their unauthorized administrative acts with such *de facto* validity as to set at naught the long considered purpose and carefully determined policy which minds of distinction have sought to effectuate for their professional younger brethren through the Ramspeck Act of 1940 and the Civil Service Act of 1883.

The statutes, Executive orders, regulations, and other functional material relevant to the matter of competitive status are set out in the Supplement hereto. Such functional material serves to disclose the competitive purpose and effect of the action of Congress and the Executive in the years before September, 1942, when the competitive examination of these petitioners and 14,000 others was held, before January 30, 1943, when Sec. 17.8 *Register of* [Attorney] *eligibles* was adopted, extending into Febru-

ary, 1943, when petitioners were placed on the register of Attorney eligibles and thereby certified for probational appointment to Attorney positions in the classified civil service (R. 55-57). These considerations leave open no other conclusion than that the Congressional and Executive intention and applicable authority required probational appointment of petitioners to these Attorney positions in the classified civil service, and that respondent was without authority to impose a war service limitation or any other limitation upon such probational appointment. Such intention and authority required that, immediately upon official notification of the satisfactory completion of their probationary year of service in such positions in the classified civil service, classified (competitive) civil service status should forthwith inure to each of the petitioners as a matter of law.

Under the circumstances the Secretary was in error in attempting to limit the petitioners' probational appointments to "War Service Indefinite Appointments" (R. 36) pursuant to inapplicable and/or unauthorized regulations and procedures, and his action in that connection was consequently unauthorized and a nullity. The grounds upon which the respondent acted were not those upon which his action can be sustained and an order cannot be sustained if an agency has misconstrued the law. *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95.

It is respectfully submitted that:

Each of the petitioners was entitled to probational appointment in an Attorney position in the classified civil service by reason of the competitive examinations and competitive procedure duly authorized and given effect with respect to him under the Civil Service Act of 1883, the Ramspeck Act of November 26, 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 and Sec. 17.6 *Registers of eligibles* of the Regulations of the Board of Legal Examiners adopted January 30, 1943, repromulgated in compendium April 23, 1943. (R. 55-57).

Petitioners were each placed on the register of eligibles established in February, 1943, were certified for probational appointment by publication of the register, and were appointed from the register by respondent by reason of the authority aforesaid. (R. 56-57).

Under such authority the respondent was legally required to make and must be deemed to have made a probational appointment of each of the petitioners from the register of Attorney eligibles under which petitioners were mandatorily certified (§ 17.8, §17.6, *supra*) for probational appointment to such Attorney positions in the classified civil service.

Each of the petitioners successfully completed his probationary period of one year in August, 1944, was officially notified thereof by respondent, and during all times thereafter a classified (competitive) civil service status or permanent civil-service tenure of employment inured to each of the petitioners as a matter of law. Effect is thus given to the steps prescribed in the Civil Service Act and implementing Executive orders and regulations. (R. 16, 50, 3).

Classified (competitive) civil service status, if available to the petitioners, would add the effect of this factor of civil service tenure of employment in any determination of petitioners' relative retention preference with respect to other veterans under the first clause of Section 12 of the Veterans' Preference Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. But it would not affect the absolute retention preference possessed by the petitioners as veterans' preference employees whose efficiency ratings are "good" or better, over all nonveteran nonpreference employees without regard to tenure of employment.

Whether or not possessed of classified (competitive) civil service status, each of the petitioner veterans was wrongfully denied his statutory right to preference in retention and has been wrongfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947 (R. 50-51, 14).

Relief calls for "an adaptation of court procedure to a remolding of the situation as nearly as it may be to what it should have been initially." *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620.

A case is presented for the exercise of the power of the District Court to restore each of the petitioners to the status of active employment in his position as of June 5, 1947, the day these suits were brought, *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 17, with all benefits, privileges, and emoluments that would normally flow and accrue to him from continuity of service on active duty with pay during the period of his illegal exclusion therefrom after June 6, 1947, to and until his restoration to such active duty. (R. 22). *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

CONCLUSION.

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed insofar as it reverses the judgments of the District Court.

Insofar as it fails to afford appropriate relief to petitioners, the judgment of the Court of Appeals should be set aside and the causes remanded to the District Court with direction for such further relief as this Court may deem just and proper.

Respectfully submitted,

C. L. Dawson,
Robert D. Elder,
Greene Chandler Furman,
Attorneys for Petitioners.

March 19, 1951.

SUPPLEMENT TO BRIEF.

The proviso of § 4 of the Act of August 23, 1912, § 4, 37 Stat. 413, 5 U. S. C. A. § 648, provides as follows:

> *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

This proviso immediately follows the provisions quoted herewith:

> Sec. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia * * * Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided* (*et seq. supra*) * * *

The Veterans' Preference Act of June 27, 1944, 58 Stat. 387, 5 U. S. C., Supp. V, §§ 851-869, provides in pertinent part as follows:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions.
>
> * * * * * * * * * * * *
>
> Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employ-

ees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *.

* * * * * * * * * *

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Pertinent provisions of the Civil Service Commission regulations for reductions-in-force (5 Code Fed. Regs. § 20.3, Supp. 1947) are set forth *supra* under *Statement*, pp. 8-9.

* * * * * * * * * *

The Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403 et seq., 5 U. S. C. § 632 et seq., provides in pertinent part as follows:

SEC. 7. No officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the classes of employees existing on January 16, 1883, or that may thereafter exist, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. Nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by * * *

* * * * * * * * * *

SEC. 2. * * *

Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First. For open, competitive examinations for testing the fitness of applicants for the public service classified on January 16, 1883, or thereafter, or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which shall fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * * * * * * * *

Fourth. There shall be a period of probation before any absolute appointment or employment aforesaid.

Section 1 of the (Ramspeck) Act of November 26, 1940, c. 219, Title I, § 1, 54 Stat. 1211, 5 U. S. C. § 631a, provides in pertinent part as follows:

SEC. 1. Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government. * * *

Executive Order No. 8743 of April 23, 1941, *Extending the Classified Civil Service* (1 CFR, Cum. Supp., pp. 927-929) provides in pertinent part as follows:

By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "'Extending the Classified Executive Civil Service of the United States'' (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows:

Section 1. All Offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.

SEC. 2. * * *

SEC. 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No.

118, 77th Congress) * * * it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to as the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and * * *.

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided*, That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule [illegible] shall be appropriately designated therein.

(g) • • •

(h) • • •

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointmnt of a person who has passed a non-competitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided*, That the non-competitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) • • •

(l) The Civil Service rules are hereby amended to the extent necessary to give effect to the provisions of this section.

Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 Federal Register, p. 2141) provides as follows:

Registers; rights of eligibles who enter military service.

Section 17.8 *Registers of eligibles* and 17.9 *Rights of eligibles who enter military service* are added as follows:

SEC. 17.8 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for

appointment from among those included, subject to the Board's minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add to a register others who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon a register for cause arising either before or after his original certification. In case the life of a register is extended, the eligibles remaining on it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

SEC. 17.9 *Rights of eligibles who enter military service* (a) An applicant whose score upon a written examination confers eligibility for oral examination shall be entitled to take a qualifying oral examination or at the option of the Board to compete in a competitive oral examination in process at the time of his request, and, if recommended by the examining committee, to be included for one year among the eligibles for positions in the grade or grades for which the original written examination was given. • • •

(E. O. 8743, 6 F. R. 2117)

BY THE UNITED STATES CIVIL SERVICE COMMISSION,
H. B. MITCHELL,
President.

(SEAL)
January 30, 1943.

(F. R. Doc. 43-2582; Filed February 16, 1943; 1:41 P. M.)

Section 17.2 *Procedure prior to the establishment of*

registers of the *Regulations of the Board of Legal Examiners*, adopted March 16, 1942 (7 *Federal Register*, p. 2201), provides in pertinent part as follows:

SEC. 17.2 *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby require a classified Civil Service status.

Executive Order No. 9063 of February 16, 1942 (1 CFR, Cum. Supp. pp. 1091-1092) provides in pertinent part:

* * *

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures as it may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

Section 18.5 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1457) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.5 *Appointment*—(a) * * * (b) *Status of appointees.* Persons appointed under these regulations will not thereby acquire a classified (competitive) civil-service

status. Unless otherwise specifically limited such appointments may be for the duration of the present war and for six months thereafter.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.11 *Extent of regulations.*—(a) * * *. (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941.

Pertinent excerpts from the Report of the *Committee on Civil Service Improvement*, appointed by the President in Executive Order No. 8044 of January 31, 1939 (1 Cum. Supp. pp. 456-457) and published as *House Document No. 118, 77th Congress*, are for convenience set out as follows:

(p. 1) 1. We recommend that all positions in the professional, scientific, and higher administrative services which are designated in Sections 1 (c) and 2 (a) of Executive Order 8044, with such exceptions as may be approved by the Civil Service Commission, be placed under the provisions of the Civil Service Act by Executive order; and by consequence under the Retirement Act of 1920, as amended.

2. We recommend that the President include in the competitive classified service all other professional, scientific, and higher administrative positions (as defined by Executive Order 8044), formerly exempt by statute but which may now be included in the classified service by executive order under the act of November 26, 1940 * * *.

(p. 2) 7. With respect to attorney positions, we recommend that the President by Executive order extend the Civil Service Act to those attorney positions which were affected by Executive Order 8044 and to those included within the authority granted him under the act of Novem-

ber 26, 1940, with such exceptions as the Civil Service Commission may approve.

However, two plans of procedure with respect to the induction of attorneys into the Government service are proposed, Plan A and Plan B. The plans differ on two points, as indicated below. Plan A recommends an unranked register of eligible candidates for attorney positions; rejects as unsatisfactory the present civil service system; asserts that attorney positions present a unique problem in the professional service which must be solved individually rather than by application of a general formula. It points out that written examinations are not trustworthy guides to capacity for many of the tasks to be performed; that present certification procedure makes it extremely difficult for the candidate to exercise any choice as to the department or agency in which he will work; and finally that until the Civil Service Commission is better acquainted with the attorney problem through practical experience the entrance into the merit system should not be confused with civil-service procedures thought to be inadequate to the attorney problem.

(p. 15) * * * attorneys are the principal class of employees affected by Executive Order 8044. * * * Two separate civil-service systems are unthinkable. * * *

(p. 29) The attorney positions total well over half of the positions withheld from the classified civil service by Executive Order No. 8044 (table VI, supra, p. 33).

The Committee is in entire accord as to the necessity that the legal positions of the Government be made a career service. * * *

(p. 31) Many recommendations from sources entitled to the greatest respect have urged a prompt inclusion of the attorney positions within the merit system. These include * * *

SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
APR 9 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.

No. 473.

CHARLES F. BRANNAN, Secretary of Agriculture,
Petitioner

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Respondents

No. 474.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Petitioners

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent

On Cross-Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE VETERANS ELDER AND FURMAN.

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
STATEMENT	1
ARGUMENT	2
I. The veterans' right to preference in reinstatement under §2 of the Act of 1944 was violated October 27, 1947, and has since been wrongfully denied (No. 473)	2
Summary of Argument (No. 473)	2
1. Section 15 is inapplicable and irrelevant to these "excepted" positions in the unclassified service	5
2. Section 14 is inapplicable and unavailable to these veterans of limited tenure	12
3. The regulations for reductions-in-force under Section 12 were inapplicable and irrelevant in No. 473	13
4. Presenting no further question, the writ of certiorari in No. 473 should be dismissed	14
II. The veterans' right to preference in retention was violated and wrongfully denied since June 6, 1947 (No. 474)	15
1. The veterans' retention preference under the 1912 provision was not and is not restricted to those having classified civil service status	15
2. The rights of these veterans under the 1912 provision are preserved by Section 18 of the Act of 1944	19
CONCLUSION	24

CITATIONS

CASES: *

Borg v. *Campbell Art Co.*, 314 U. S. 236, 248	22
Campbell v. *Galeno Chemical Co.*, 281 U. S. 599, 610	22
Colorado v. *Toll*, 268 U. S. 228, 230	24
Dismuke v. *United States*, 297 U. S. 167, 171	23
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 276	23
Helvering v. *Hallock*, 309 U. S. 106, 119-121	22, 23
Helvering v. *Powers*, 293 U. S. 214, 224	22
International Ry. Co. v. *Davidson*, 257 U. S. 506, 514	22
Interstate Commerce Commission v. *Union Pac. R. Co.*, 222 U. S. 541, 547, 548	23
Lynch v. *Tilden Produce Co.*, 265 U. S. 315, 320-321	22
Ma-King Products Co. v. *Blair*, 271 U. S. 479, 482	24
McKenna v. *White*, 237 Mass. 485, 192 N. E. 84, 85, 86	13
Medbury v. *United States*, 173 U. S. 492, 497-498	22
Miller v. *United States*, 294 U. S. 435, 440	22

* In addition to cases cited in the Veterans' Brief for the Petitioners filed March 19, 1951.

	Page
Mitchell v. *Cohen*, 333 U. S. 411, 423	20
Morrill v. *Jones*, 106 U. S. 466, 467	22
Pope v. *United States*, 323 U. S. 1, 14	24
Roth v. *State*, 158 Ind. 242, 254, 63 N. E. 460, 464, 466	13
Snyder v. *Buck*, 75 F. Supp. 902, 907-908	24
State ex rel. Eckles v. *Kansas City*, — Mo. App. —, 257 S. W. 197, 200-201	13
State ex rel. Hart v. *Duluth*, 53 Minn. 238, 55 N. W. 118, 119-120	13
Tagg Bros. v. *United States*, 280 U. S. 420, 442	23
United States v. *Carolina Carriers Corp.*, 315 U. S. 475, 489	22, 23
United States v. *George*, 228 U. S. 440, 443	22
United States v. *Laughlin*, 249 U. S. 440, 443	23
Utah Light & Power Co. v. *United States*, 242 U. S. 399, 410	22
Virginian R. Co. v. *System Federation*, 300 U. S. 515, 562	23
Williams v. *Fanning*, 332 U. S. 490, 493-494	24

MISCELLANEOUS:

H. Rept. No. 633, 62d Cong., 2d Sess., p. 14	16
48 Cong. Record, p. 6191	16
S. Rept. No. 832, 62d Cong., 2d Sess., p. 7	16
H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67	16

IN THE

Supreme Court of the United States

October Term, 1950.

No. 473.

CHARLES F. BRANNAN, Secretary of Agriculture,
Petitioner

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Respondents

No. 474.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Petitioners

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent

On Cross-Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE VETERANS ELDER AND FURMAN.

STATEMENT.

The petitioner-respondent Secretary of Agriculture will be referred to as "the Secretary"; Elder and Furman as "the veterans" or "the petitioners".

On March 19, 1951, the veterans filed their consolidated Brief in both No. 473 and 474, dealing with the entire range

of both cases as "Petitioners", in deference to the practical purpose of Rule 28(1) of this Court. The consolidated "Statement" at pp. 5-9 of such "*Brief for the Petitioners*" comprises all facts material to the consideration of the questions presented in both No. 473 and No. 474.

ARGUMENT.

I.

The Veterans' Right to Preference in Reinstatement Under § 2 of the Act of 1944 Was Violated October 27, 1947, And Has Since Been Wrongfully Denied. (No. 473)

Summary of argument.

Section 15 is inapplicable and irrelevant to the issues in No. 473. The provisions of Sections 7 and 8, which are incorporated by reference in Section 15, prescribe an integral procedure applicable and available only with respect to positions in the competitive service subject to the Civil Service Act and Rules, and inapplicable and unavailable with respect to the "unclassified" and "excepted" Attorney positions which are the subject of the instant suits. Such Attorney positions were "excepted" from the competitive civil service and from the operation of the Civil Service Act and Rules since May 1, 1947, by Schedule A of the new Civil Service Rules [86.4, 12 F. R. 2839].

The regulations for reductions-in-force under Section 12 are admittedly and clearly inapplicable and irrelevant to the issues in No. 473. (No. 473, Secy. Br. 23; Veterans' "Brief for the Petitioners", 41-42). The Court of Appeals expressly held that such regulations for reductions-in-force under Section 12 were not violated (R. 91-92) and held that only the rights to preference in reinstatement under Section 2 were violated (R. 93-95). Such regulations are thus no part of the basis for the judgment of the Court of Appeals attacked by the Secretary in No. 473.

The Secretary's Petition for a writ of certiorari in No. 473 presents the sole question whether Section 15, rather

than the regulations for reductions-in-force under Section 12, governs the "reemployment rights of veterans properly separated from their positions in federal service" (No. 473, Secy. Petition, p. 2). Since each of these alternatives is unavailable, inapplicable, and irrelevant to the issues in No. 473, the sole question presented by the Secretary is irrelevant and moot. Since no other question is presented by the Secretary's Petition for a writ of certiorari in No. 473, the writ of certiorari in No. 473 should be dismissed. Rule 38(2), p. 30, of the Revised Rules of the Supreme Court of the United States provides *inter alia*:

> "* * * Only the questions specifically brought forward by the petition for the writ of certiorari will be considered. * * *"

Section 2 embodies the general policy and purpose of the Veterans' Preference Act of 1944. Section 2 itself designates, creates, grants, prescribes, and defines the initial scope and effect of five specific preferences which Congress therein commands "shall be given" in the unclassified civil service, as well as in the classified civil service, and in the comprehensive scope throughout the Government therein prescribed and defined, to four primary classes of veterans. In Section 2 this grant is in no way qualified by or conditioned upon tenure of employment, length of service, or efficiency ratings.

Among the five preferences so granted is the third specific preference in *reinstatement*.

In each of several later sections of the Act, e.g. 5, 7, 8, 12, 13, and 16, Congress has further defined, extended, or limited the scope and effect to be given one or more of the specific preferences granted under Section 2. For example, in Section 12 Congress limited the preference in retention to a sub-class of veterans' preference employees whose efficiency ratings are "good" or better. And in Section 5 Congress extended, rather than limited, the scope and effect of the specific preferences in *reinstatement*, retention, and appointment, so that the waivers as to age, height,

and weight therein described may be available to veterans entitled to such specific preferences.

The initial scope or effect of the specific preference in *reinstatement* under Section 2 is not elsewhere limited or further defined, except in Section 5 as above noted.

Any additional provision or exception from the general policy embodied in Section 2 is subject to the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment. *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312.

In enacting Section 2 Congress adopted the known and settled construction of its key provisions by the Courts of the State of New York, a construction which confirms the intention and purpose expressed by the plain language of Section 2 and makes the natural import and meaning thereof effective. *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307; and see *Stutzbach* v. *Coler* (1900) 62 App. Div. 219, 70 N. Y. S. 901, 904-907, affd. 168 N. Y. 416, 419-421; and other cases cited and discussed at pp. 33-37 of the veterans' "Brief for the Petitioners".

The reports of committees of the Congress, remarks of sponsors, and other matters incidental to legislative history, cannot be resorted to for the purpose of construing Section 2 of the Act of 1944 or any other statute contrary to its plain language and meaning and to the natural import of its terms. *Ex Parte Collett*, 337 U. S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83. The rule is that expression by the legislature of an erroneous opinion about the law does not alter it. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163.

Counsel for the Secretary contend that certain regulations of the Civil Service Commission deal with "reinstate-

ment" as "a type of reemployment available only to persons with competitive status", or as confining any right to "reinstatement" to employees with competitive status.

Section 2 expressly prescribes that preference in reinstatement shall be given to veterans in the *unclassified* civil service as well as in the classified civil service. Such regulations fail to carry out the will of Congress as expressed in the statute, operate to create a rule out of harmony with the statute, and are an unauthorized nullity insofar as veterans are concerned. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

The rights of each of these veterans to the specific preference in reinstatement in the position from which he had been removed—Attorney, Grade P-3—were violated by the reinstatement, or reemployment, or employment of non-veterans in such positions on October 27, 1947, *et seq.*, while continuing to exclude the veterans therefrom. Cf. *People ex rel. Shields* v. *Scannell* (1900), 48 App. Div. 69, 73, 62 N. Y. S. 682, 683; *Meenaugh* v. *Dewey, District Attorney* (1939) 17 N. Y. S. 2d 599, 601.

1. Section 15 is inapplicable and irrelevant to these "excepted" positions in the unclassified service. (No. 473)

The Secretary concedes that in Section 2 Congress does "declare a general policy of preference" (No. 473, Br. 13, 12).

But his counsel contend that in Section 15 "Congress carefully delimited the scope of the veterans' reemployment [sic] rights" (No. 473, Br. 11) and that "their rights to be rehired [sic] depended on Section 15, which deals specifically and exclusively with the reemployment [sic] preference" (No. 473, Br. 21, 2).

Throughout their No. 473 Brief counsel persist in this spurious assumption that the specific preference in reinstatement designated and prescribed by Section 2 is in-

tended by Congress to mean the same thing as the preference in reemployment, and *vice versa*, and intended to mean the same thing as the term "recertification and reappointment" employed in Section 15. In plain words, of course, Section 15 makes no reference to either reinstatement or reemployment; and neither of these terms is commensurate in meaning, area, or character with "recertification and reappointment." But it is unnecessary to pursue the Secretary's assumption to its extinction in some etymological swamp.

For Section 15 in itself discloses that its provisions do not and cannot affect the rights of either of the two veterans in the instant case with respect to the position of Attorney, Grade P-3, from which each has been removed.

Section 15 provides conditions upon compliance with which a preference eligible "shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in Section 7 and 8 hereof * * * for every position for which his qualifications have been established."

Section 15 does *not* provide that a veteran "shall then be eligible" for recertification alone, or for reappointment alone, or for recertification and/or reappointment, but that such veteran

> "* * * shall then be eligible for recertification *AND* reappointment *IN THE ORDER* and *according to the procedure* as provided for in Sections 7 and 8 hereof." [Emphasis supplied].

Necessarily, "certification for appointment," or "recertification for reappointment", precedes appointment or reappointment as the case may be, and does not follow appointment or reappointment. Section 8 commences with the determinative provision:

> "Sec. 8. When, *in accordance with civil service laws and rules* a nominating or appointing officer shall request certification of eligibles for appointment pur-

poses, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names * * *" [Emphasis supplied]

By virtue of Section 8, therefore, the integral consecutive procedure of Section 15 in "recertification and reappointment" is explicitly confined to definite situations *"in accordance with the civil service laws and rules"*. The specific procedure defined under Section 8 and Section 15 is accordingly made applicable only with respect to situations and positions in the competitive service subject to the civil service laws and rules. Such integral consecutive procedure is accordingly unavailable and inapplicable with respect to any situation or position which is not subject to, or which is "excepted" from, the competitive service and from the operation of the Civil Service Act and Rules.

At this point this Court will doubtless be aware, and take judicial notice from the Civil Service Rules and Regulations cited by both parties herein, that there is no "appropriate register" or even list of Attorney eligibles from which the Civil Service Commission can certify any names whatever—and that there has been no such register or list since May 1, 1947. Since that date any attorney who calls at the Civil Service Commission, and inquires about employment in an Attorney position with the Government, is politely but definitely told that the Civil Service Commission has nothing to do with Attorney positions or with the employment of Attorneys, that there is no examination of any sort, no register of Attorney eligibles, no list of same, and no available information about any agency which may require the services of an Attorney.

This, by the simplest of definitions, is what is meant by an "excepted position".

Counsel for the Secretary have repeatedly insisted [e.g. No. 473, Secy. Br., 19, 21] that the Attorney positions here in question have been expressly excepted from the competitive service and from the Civil Service Act and Rules by the listing under Schedule A of the new Civil Service

Rules effective May 1, 1947 (12 F. R. 2839, § 6.4), which provides:

> "§ 6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule A.* The following positions are those excepted from the competitive service
> • • •
> (ii) Cooks • • •
> (iv) Attorneys.
> (v) Chinese, Japanese, and Hindu interpreters.
> • • •".

These Rules of May 1, 1947, further provide:

> "§ 1.1 *Positions and employees affected by these Rules.* (a) These rules shall apply to all positions in the competitive service. • • • The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom. • • •
>
> (b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. • • • A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or by Civil Service Rules." (12 F. R. 2831, § 1.1).

Accordingly, such integral consecutive procedure for "recertification and reappointment" under Section 15 is *per se* applicable only to positions and employees in the competitive service subject to the Civil Service Act and Rules, and is *per se* inapplicable to positions in the pariah caste of Cooks, Attorneys, Chinese, Japanese, and Hindu interpreters, et al, which have been since May 1, 1947, expressly excepted from the competitive service and Civil Service Act and Rules. §§ 1.1 and 6.4, *supra.*

The attention of the Court is invited at this point to the correlative significance of the above definitions by the Civil Service Rules in connection with an alternative aspect of the Argument under Part IV at page 45 of our previous

brief. By virtue of §§ 1.1 and 6.4 of the Rules, neither a veteran nor a nonveteran employee who is in a position excepted from the competitive service—as Attorney, Grade P-3—is subject to the Civil Service Act and Rules. A nonveteran in such unclassified noncompetitive position, whatever his civil service status or tenure, would thus *not* be subject to the regulations for reductions-in-force under said Civil Service Act and Rules. (§ 20.3, 12 F. R. 2850). Therefore classification in a higher retention subgroup A-2 would not be available to a nonveteran over a veteran in such position. Being expressly excepted and negatived by the Commission under § 6.4 of its Rules, the alleged basis of (1) *"administrative construction,"* and (2) *administrative action*, alike fails in the premises; and the mandatory statutory preference in retention of the veterans' preference employee whose efficiency ratings are "good" or better must be deemed to prevail and be given effect by the Secretary, the Commission, and the District Court.

It is also to be observed that the eligibility for "recertification and reappointment" under Section 15 expressly extends to "every position for which his qualifications have been established."

Under the terms of Section 2, the grant of the specific preference in reinstatement is, by its intrinsic natural import, necessarily limited to *"the position from which he has been removed."* *Collins* v. *United States*, 15 Ct. Cl. 22; *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

The language of Section 2, as well as of Section 15, 8, and 7, affords no tenable basis for the writing in of a conclusion that Congress intended, in the guise of "recertification and reappointment" under Section 15, to *extend* the preference in *reinstatement* from its intrinsically limited scope and effect in "the position from which he has been removed" to a conflicting and variant scope and effect with respect to "every [other] position for which his qualifications have been established" (Sec. 15, *supra*).

Nor do the plain terms of Sections 2, 7, 8, and 15, construed together, afford any reasonable basis for a determination, that Congress intended to subject the specific preference in "reinstatement" to any of the conditions which it imposed on "recertification and reappointment". *Thompson* v. *United States*, 280 U. S. 420, 442.

Counsel argue that reinstatement is a right limited to persons with competitive status, and for support refer to a Civil Service regulation (5 CFR (1949) Part 7) and the Federal Personnel Manual (p. Z1-245), which counsel say "make use of reinstatement" as "a type of reemployment available only to persons with competitive status." (No. 473, Secy. Br. 19).

The words used by Congress in a statute are presumed to be used in their usual and most ordinary sense, and with the meaning commonly attributed to them. If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 282 U. S. 399, 409.

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336.

The Commission's alleged construction of the word "reinstatement", dated 1949, would change in a radical fashion the natural import and most ordinary sense of the word as well as the meaning commonly attributed to it.

Moreover, it wholly disregards the mandate of Congress in Section 2 that the preference in reinstatement shall be given in the *unclassified* civil service as well as in the classified civil service, and thus achieves a rule out of harmony with the statute which has the effect of nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

Counsel for the Secretary insist that:

> "The later sections of the Act define the substance of 'preference' with respect to appointment, retention, reinstatement, and reemployment" (No. 473, Secy. Br. 14).

In the same breath counsel concede:

> "There is no basis in the statute for substituting the preferences created in the one employment area for those established in the other." (No. 473, Secy. Br. 23).

We quite agree that there is no tenable basis for substituting the preference created in reemployment for the preference created in reinstatement, and no tenable basis for substituting the purely competitive and classified procedure of "recertification and reappointment" for the intrinsically different preference created in reinstatement "in the position from which he [the veteran] has been removed".

This view is indicated and confirmed by the action of Congress throughout the several sections of the statute. When Congress further defined rights with respect to the preferences in reinstatement, retention, and appointment in Section 5, it did so explicitly, using the Section 2 terms *reinstatement*, *retention*, and *appointment* to indicate its intention further to define each of these specific preferences. When Congress in Section 12 further dealt with and imposed the condition of a "good" efficiency rating upon the previously absolute preference in retention created under Section 2, Congress did so explicitly, using

the unmistakable term "shall be retained in preference", as in Section 5 with the term "retention". In like manner Congress referred definitely to "certification" throughout Sections 8, 13, 15, and 16, in further dealing with and defining in scope the specific preference in "certification for appointment" created *in limine* in Section 2. The same is true with respect to the specific preference in appointment created and prescribed by Section 2 and further dealt with in like manner in Sections 5, 7, 8, 13, 15, and 16.

In addition to the elementary considerations involved and previously discussed, the provisions of Sections 15, 8, and 7 of themselves necessitate the conclusion that they are unavailable, inapplicable, and irrelevant with respect to the situation and the Attorney position involved in the instant case. If a given construction were intended—i. e. that veterans' rights to the specific preference in reinstatement, designated, created, prescribed, and defined under Section 2, are intended to be further defined, limited, or eliminated for all practical purposes under Section 15—it would have been easy for the Congress to have expressed such intention in apt terms. *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 246. Remedial rights and processes may not be disposed of by conjecture. *Thompson* v. *United States*, 280 U. S. 420, 442; *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312.

2. Section 14 is inapplicable and unavailable to these veterans of limited tenure.

Section 14 of the 1944 Act is expressly made applicable only to preference eligibles of "*permanent or indefinite*" tenure of employment, while the Secretary insists that these veterans have no such tenure but were accorded only tenure limited to the duration of the war and six months thereafter, and so cannot be considered "employees who have met all requirements for indefinite retention in their present position." § 20.3, 12 F. R. 2850, Regulation for

reduction in force. Section 14 of the Act of 1944, with the administrative remedy of appeal to the Civil Service Commission thereunder, which these veterans mistakenly pursued and exhausted (R. 55), was plainly inapplicable with respect to the agency action complained of herein. The express terms of Section 14 make it applicable only in cases of employer agency action involving dismissals, etc., *for cause*, i. e. delinquency, inefficiency, or misconduct on the part of the individual employee so dismissed. *For cause* means some dereliction or general neglect of duty, or some delinquency affecting the general character of the officer, or his fitness for holding the office, or his incapacity to discharge the duties thereof. *McKenna* v. *White*, 287 Mass. 485, 192 N. E. 84, 85, 86; *Roth* v. *State*, 158 Ind. 242, 254, 63 N. E. 460, 464, 466; *State ex rel. Eckles* v. *Kansas City*, — Mo. App. —, 257 S. W. 197, 200-201; *State ex rel. Hart* v. *Duluth*, 53 Minn. 238, 55 N. W. 118, 119-120; cf. *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

Section 14 of the 1944 Act was thus inapplicable both to these veterans of limited war-service tenure and to the instant case of releases purely in reduction in force, involving no such delinquency, efficiency, or misconduct.

3. The regulations for reductions-in-force under Section 12 are inapplicable and irrelevant in Tr. 473.

The Court of Appeals expressly held that such regulations for reductions-in-force under Section 12 were not violated (R. 91-92) and held that only the rights to preference in reinstatement under Section 2 were violated (R. 93-95). Such regulations are thus no part of the basis for the judgment of the Court of Appeals attacked by the Secretary in No. 473. The regulations for reductions-in-force under Section 12 are clearly and admittedly inapplicable and irrelevant to the issues in No. 473. (No. 473, Secy. Br. 23; Veterans' "Brief for the Petitioners", 41-42).

Repetition of argument at pp. 41-45 of our preceding Brief would be an imposition.

4. Presenting no further question, the writ of certiorari in No. 473 should be dismissed.

The Secretary's Petition for a writ of certiorari in No. 473 presents the sole question whether Section 15, rather than the regulations for reductions-in-force under Section 12, governs the "reemployment rights of veterans properly separated from their positions in federal service" (No. 473, Secy. Petition, p. 2). Since each of these alternatives is unavailable, inapplicable, and irrelevant to the issues in No. 473, the aforesaid sole question presented by the Secretary is irrelevant and moot.

Counsel for the Secretary were well aware that under Rule 38(2) of this Court:

> "... Only the questions specifically brought forward by the petition for the writ of certiorari will be considered. ..."

Nevertheless, in their instant Brief for the Secretary in No. 473, counsel proceed to argue at length further questions concerning the veterans' rights to preference under Section 2. But only rights under Section 15 and under the regulations for reductions-in-force under Section 12 were brought forward by the Secretary's Petition for a writ of certiorari in No. 473. Counsel for the Secretary are not entitled, in defiance of the Rules of this Court, to conduct a fishing excursion into every other question which now or later occurs to them, and to argue from a blank sheet any or all of such questions.

Since the sole question in No. 473 fails and no other question was brought forward by the Secretary's Petition for a writ of certiorari, the writ of certiorari in No. 473 should be dismissed.

II.

The Veterans' Right to Preference in Retention Was Violated and Wrongfully Denied Since June 6, 1947. (No. 474)

1. The veterans' retention preference under the 1912 provision was not and is not restricted to those having classified civil service status.

In their present Brief in No. 474 counsel persist in urging the same view which was adopted by the Court of Appeals when it held that:

> "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91).

The court thus adopted the argument then made that:

> "Section 4, to which the [1912] proviso was attached, concerned *civil service tenure* in the District of Columbia. The proviso obviously partakes of that purpose and is limited by the context to employees with such *civil service status.*"

No provision concerning *civil service tenure* or *civil service status appears* in Section 4 or in any part of the Act of 1912.

There was an unsuccessful effort to insert a provision concerning *civil service tenure or status* in a rider abortively designated as "Section 5" which finally failed of passage. Such "Section 5" provided that *civil service tenure* be limited to five years. Both § 4 and "Section 5" were introduced as riders to the Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, and to each section was later appended on the floor the same veterans' preference proviso as a rider appended to a rider. During the subsequent legislative proceedings this unhatched "Section 5", both with and without the veterans'

proviso appended thereto, was repeatedly repudiated and was finally dropped altogether. Meanwhile § 4, with the same veterans' proviso appended, was in due course included in the omnibus Appropriation measure as finally enacted August 23, 1912 (37 Stat. 360, 413). A consecutive statement of the proceedings follows herewith.

The "1912 proviso" was a rider appended to a rider inserted in the Annual Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, finally enacted August 23, 1912. The House Committee on Appropriations recommended "Section 5" of the bill (H. R. 24023) which provided for limitation of civil service tenure to five years, without any veterans' preference proviso. H. Rept. No. 633, 62d Cong., 2d Sess., p. 14. A veterans' preference proviso was added on the floor of the House. 48 Cong. Rec., p. 6191. The Senate Committee on Appropriation struck out "Section 5", including the appended proviso, and inserted a new Section 4 establishing a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia, also without any veterans' preference proviso. S. Rept. No. 832, 62d Cong., 2d Sess., p. 7. The Conference Agreement thereafter included both § 4 (as above) and "Section 5" (limiting civil service tenure to 7 years), with an identical veterans' preference proviso attached to each of the two Sections. H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67. In this form the measure was vetoed *in toto* by the President, because of his objection to "Section 5" and to still another rider abolishing the Commerce Court. Id., pp. 1-4. The measure, as finally passed by both House and Senate and approved by the President, dropped "Section 5" entirely, but included § 4 with the veterans' preference proviso appended thereto. The entire Section 4, as finally enacted, reads as now incorporated in the Statutes at Large, 37 Stat. 360, 413.

The entire legislative proceedings, *supra*, serve as an illustration of the futility and unsoundness of "constructing" a Congressional "intention" upon such fortuitous

maneuvers. *Ex parte Collett,* 337 U. S. 55, 61. In this instance, the circumstances warrant no more than an inference of the utter *indifference* of Congress to the context into which an *independent and substantive provision* is engrafted as a parasitic rider with the single intention of getting it passed and on the books as law.

The opinion in *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U. S. 238, 242, 246, describes similar set of legislative maneuvers. See, also, some of the other cases in which such a proviso has been interpreted as an independent and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases within the meaning of the language used. *United States* v. *Babbit,* 66 U. S. 55, 61; *Springer* v. *Government of the Philippine Islands,* 277 U. S. 189, 207; *McDonald* v. *United States,* 279 U. S. 12, 20-21; *Georgia Banking & Railroad Co.* v. *Smith,* 128 U. S. 174, 181; *American Express Co.* v. *United States,* 212 U. S. 522, 534; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 36, 37.

It is not without significance that neither the *1876* proviso—which granted an absolute retention preference to veterans "equally qualified"—nor the Section 3 in which it is found, nor the omnibus Appropriation Act of 1877 of which it forms a part, contains any mention of the classified civil service or of classified (permanent) tenure of employment or any language even remotely suggesting that the veterans' preference given under Section 3 had any connection whatever with the classified civil service or to veterans having classified (permanent) tenure of employment. There has, in fact, been a total lack of rational connection between veterans' preference and tenure of employment throughout the entire legislative history of the 1876 and 1912 provisos.

The 1876 proviso has been construed by this Court together with the 1912 proviso *in pari materia* with the 1944 Act as forming one act and as embodied in the 1944 Act. *Hilton* v. *Sullivan,* 334 U. S. 323, 335-339.

The well-established rule requires that the later of such acts *in pari materia*—the 1944 Act—be regarded as a legislative recognition and declaration of the true construction of the prior law of 1912 and as intended to remove any doubt previously existing as to the meaning of such prior law. *Weedin* v. *Chin Bow*, 274 U. S. 657, 668; *Johnson* v. *Southern Pac. R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7.

When Congress, in the forthright language of Section 2 of the Act of 1944, declared and commanded that preference in retention shall be given in the *unclassified* civil service as well as in the classified civil service the question was settled plainly, completely, and finally.

It comes simply to this:

(a) Section 4, to which the 1912 proviso was attached, did *not* concern *civil service tenure*. So the 1912 proviso could *not* "partake of that purpose and be limited by the context of the section to employees with such *civil service status*."

(b) Section 4 of the 1912 Act did establish a system of efficiency ratings for the classified service. *Quære*, whether the 1912 proviso partakes of that purpose or is limited by the context of the section to employees in the *classified service*?

(c) Congress, in Section 2 of the Act of 1944, declares and commands that preference in retention shall be given in (a) the classified civil service; (b) the *unclassified* civil service: this is conclusive legislative recognition and declaration that the preference in retention under the prior law of 1912 *is not* and *was not* limited to the classified service, but extends to the *unclassified* civil service as well. *Weedin* v. *Chin Bow*, and other cases above cited.

Nowhere in his Brief in No. 474 does the Secretary face down the obvious and unmistakable intention of Congress when it placed this provision at the forefront of the Act

of 1944. In his Brief in No. 473 he concedes that Section 2 does "declare a general policy of preference" (Br., 13). It is respectfully submitted that the foregoing is an essential part of the policy and purpose of Congress.

2. The rights of these veterans under the 1912 provision are preserved by § 18 of the 1944 Act.

Counsel argue that the 1912 proviso "has no standing as independent legislation for it was superseded by the 1944 Act." Counsel cite H. Rept. No. 1289, 78th Cong., 2d Sess., p. 7, where such a statement was made, presumably with the normal import of "displace, supplant, repeal."

As stated by the Senate Committee on Civil Service, Section 18 of the Act of 1944 "contains a saving clause for the protection of existing rights under present laws, Executive orders, rules and regulations." S. Rept. No. 907, 78th Cong., 2d Sess., p. 4. Section 18 reads:

> "Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof."

The protection of this saving clause applies with precision to each of these petitioner veterans. Each received an honorable discharge from the United States Army—Elder on December 9, 1918; Furman on May 5, 1942—and since these respective dates each has been an honorably discharged soldier as well as an ex-serviceman who served on active duty in the Infantry branch of the armed forces of the United States during World War I and World War II respectively, and each was separated therefrom under honorable conditions (R. 3, 77, 50). From August 1, 1943, to June 6, 1947—almost four years—each of them was employed in a civilian position in the United States Depart-

ment of Agriculture at Washington, D. C., with departmental efficiency ratings of "good" or better. (R. 50, 3, 77).

These undisputed allegations, without more, establish: (1) that each of the petitioner veterans has been a veterans' preference eligible and preference employee since a definite date long prior to the enactment on June 27, 1944, of the Veterans' Preference Act of 1944; (2) that the long standing absolute retention preference rights given by the 1912 provision and embodied in the 1944 Act, *Hilton* v. *Sullivan*, 334 U. S. 323, 336-339, were granted to and have been possessed by these petitioners since 1918 and 1942 respectively and since June 27, 1944, have been protected and preserved for each of them under the saving clause in Section 18 of the Act of 1944. *Mitchell* v. *Cohen*, 333 U. S. 411, 423.

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 162, the Court said:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create ambiguity; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."

In *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77, 83, the Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve*, but not to *create* an ambiguity' (cit. cases). Or as stated in *United States* v. *Hartwell*, 6 Wall. 385, 386, 'If the language is clear it is conclusive. There can be no construction when there is nothing to construe'."

There is nothing ambiguous about the saving clause in Section 18. But even it has had "legislative history" dragged out for dissection in this case.

The committee reports stated simply that the saving clause in Section 18 protects existing statutory rights of "peacetime veterans." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 3; S. Rept. No. 907, 78th Cong., 2d Sess., p. 2. So it was argued below that this saving clause "was intended *merely* to protect the preference of *peace*-time veterans", and accordingly that all but *peace*-time veterans are excluded from such preference, protection, and benefit. Of course, this construction that the 1912 provision was preserved with open arms for *peace*-time veterans but denied to *war*-time veterans, was cut from the same cloth as the construction that the 1912 provision was "superseded." It is obvious that both could not be true. Each of these pseudo-constructions is peculiarly repugnant to the entire spirit, intent, and policy of the Congress "since the beginning of the Republic to extend certain [not uncertain and illusory] benefits to those who have risked their lives in the armed forces during wartime." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944.

Either of such constructions would be manifestly incompatible with the determination of this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 337-339: that the purpose of Congress in passing the Act of 1944 was not to take away but to strengthen and broaden—precisely the opposite from narrow—the veterans' preferences then embodied in statutes and executive orders, and that any interpretation or holding is prohibited which would mean that passage of the Veterans' Preference Act of 1944 narrowed the existing scope of veterans' preferences in case of reduction in force of government personnel.

Counsel for the Secretary argue that:

> "Respondents [veterans] apparently claim (Resp. Br., p. 31) that this savings-clause preserves the 1912 statute, as they construe it, as a separate and indepen-

dent source of retention benefits." (No. 474, Secy. Br., 16)

Lest the Court be misled, we quote from the page 31 of our Brief cited by counsel:

> "Pursuant to Section 18 of the Act of 1944 and the above determination of this Court, the Secretary of Agriculture was subject under the second proviso of Section 12 of the Act of 1944 to ~~be~~ *embodied import and effect of the absolute 1912 command* not to discharge, drop, or reduce in rank or salary any such veteran government employees as these petitioners." (No. 473-474, Veterans' Br. 21) [Emphasis supplied]

It is respectfully submitted that both the 1912 provision and its embodied rights, import, and effect in the Act of 1944 have been administered by the Civil Service Commission under an unfounded and erroneous administrative construction expressed in regulations which fail to carry into effect the will of Congress as expressed in the Act of 1944 with its embodiment and broadening of the rights, import, and effect of these earlier acts in *pari materia*. The regulations thus operate to create a rule out of harmony with the statutes and are an unauthorized nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 129, 143; *Morrill* v. *Jones*, 106 U. S. 466, 467; *Miller* v. *United States*, 294 U. S. 435, 440; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *Helvering* v. *Hallock*, 309 U. S. 106, 119-121; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *United States* v. *George*, 228 U. S. 14, 21; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514; *Borg* v. *Campbell Art. Co.*, 214 U. S. 236, 248; *Helvering* v. *Powers*, 293 U. S. 214, 224; *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320-321; *Utah Light & Power Co.* v. *United States*, 243 U. S. 389, 410.

The facts that the regulations had stood for some time, that the statute had been reenacted, and that former decisions had to be overturned, were held by this Court not to excuse the court from applying the law correctly and from

overturning the previously incorrect decisions. *Helvering* v. *Hallock*, 309 U. S. 106, 119-121, *supra*.

Neither the court nor the commission is warranted in departing from the prescribed statutory standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489, *supra*.

Where statutory rights, as here, have been denied by agency action, the decision of the Civil Service Commission, denying the appeals of these veterans and approving the Secretary's agency action in denial and violation of such rights, is clearly subject to revision by the Court.

The agency action of the Secretary, the administrative construction embodied in the regulations, and the administrative decision of the Civil Service Commission approving such action, alike turned on a pure question of law, in respect of which the Secretary and the Commission misconstrued the law. The administrative determination of that question is subject to judicial review in the present suits. *Dismuke* v. *United States*, 297 U. S. 167, 171; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 562; *United States* v. *Laughlin*, 249 U. S. 440, 443; *Medbury* v. *United States*, 173 U. S. 492, 497-498; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 276; *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547, 548.

Such administrative decisions or rulings cannot enlarge or diminish the meaning of statutes enacted by Congress, nor add to or subtract from the terms of an act of Congress, nor confer legality upon agency action which is in direct violation of the statutory legal rights of these petitioners to the long standing absolute retention preference of veterans given by the 1876 and 1912 Acts and broadened, strengthened, and embodied in the 1944 Act. The power of the Civil Service Commission will not, in the absence of a plain command, be deemed to extend to the denial of a

right which the statutes create and to which the petitioners, upon facts found or admitted by these administrative officers, are entitled. (Cases cited *supra*)

Such review is now prescribed by express provisions of Section 10 of the Administrative Procedure Act of June 11, 1946. §10, 60 Stat. 243, 5 U. S. C. § 1009. Cf. *Snyder* v. *Buck*, 75 F. Supp. 902, 907-908 (D. C., D. C., 1948); *Ma-King Products Co.* v. *Blair*, 271 U. S. 479, 483; *Pope* v. *United States*, 323 U. S. 1, 14.

These suits for violation of the legal rights of the petitioner veterans under the applicable statutes may be maintained against the Secretary of Agriculture without joining the Civil Service Commission which promulgated the regulations pursuant to which the Secretary assumed to act. *Williams* v. *Fanning*, 332 U. S. 490, 493-494; *Colorado* v. *Toll*, 268 U. S. 228, 230. Adequate relief may be afforded by "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially." *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 298 U. S. 1, 17.

CONCLUSION.

For the reasons stated in our foregoing briefs in No. 473 and No. 474:

The judgment of the Court of Appeals should be affirmed insofar as it reverses the judgments of the District Court.

Insofar as it fails to afford appropriate relief to petitioners in No. 474, the judgment of the Court of Appeals should be reversed and the causes remanded with direction for such relief as this Court may deem just and proper.

Respectfully submitted,

C. L. Dawson,
Robert D. Elder,
Greene Chandler Furman,
Attorneys for Petitioners.

April 7, 1951

LIBRARY
SUPREME COURT, U.S.

DEC 20 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

December, 1950

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	5
Reasons for granting the writ	8
Conclusion	16

CITATIONS

CASES:

Alexander v. *Alexandria*, 5 Cranch, 1, 7	10
Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U.S. 315, 330-331	14
Bailey v. *Clark*, 21 Wall. 284, 288	21
Blair v. *City of Chicago*, 201 U.S. 400, 475	10
Brewster v. *Gage*, 280 U.S. 327, 336	14
Campbell v. *Galeno Chemical Co.*, 281 U.S. 599, 610	14
Caminetti v. *United States*, 242 U.S. 470, 485	14-15
Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U.S. 238, 242-246	11, 12
Cope v. *Cope*, 137 U.S. 682, 688	10
Cox v. *Hart*, 260 U.S. 427, 435	12
Dewey v. *United States*, 178 U.S. 510, 520-521	15
Elder v. *Brannan*, 184 F. 2d 219, 335-339	1
Ex parte Public National Bank, 278 U.S. 101, 104	12
Georgia Railroad & Banking Co. v. *Smith*, 128 U.S. 174, 181	11, 12
Hilton v. *Sullivan*, 334 U.S. 323, 335-339	9, 10, 11, 12, 15, 16
Houghton v. *Payne*, 194 U.S. 88, 100	14, 15
Interstate Commerce Commission v. *Baird*, 194 U.S. 25, 36-37	11
Johnson v. *Southern Pac. Ry. Co.*, 196 U.S. 1, 21	10
Kvos, Inc. v. *Associated Press*, 299 U.S. 269, 279	16
Louisville & Nashville R. Co. v. *United States*, 282 U.S. 740, 757, 759	14
McDonald v. *United States*, 279 U.S. 12, 20-21	11, 12
Market Co. v. *Hoffman*, 101 U.S. 112, 115-116	12
Manhattan General Equipment Co. v. *CIR*, 297 U.S. 129, 134	14
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498, 508	14
Minis v. *United States*, 15 Pet. 423, 445	12
Piedmont Northern Ry. Co. v. *ICC*, 286 U.S. 299, 311-312	10
Spokane & Island R. Co. v. *United States*, 241 U.S. 344, 350	10
Springer v. *Government of Philippine Islands*, 277 U.S. 189, 207	11
Swendig v. *Washington Water Power Co.*, 265 U.S. 322, 331	14
Texas & Pac. R. Co. v. *United States*, 289 U.S. 627, 640	14
United States v. *Babbit*, 66 U.S. 55, 61	11
United States v. *Freeman*, 3 How. 556, 564-565	10
United States v. *Lexington Mill & Elevator Co.*, 232 U.S. 399, 409	15
United States v. *Morrow*, 266 U.S. 531, 534-535	12
United States v. *Standard Brewery, Inc.*, 251 U.S. 210, 217-220	13-14
United States v. *Tanner*, 147 U.S. 661	14
Webster v. *Fall*, 266 U.S. 507, 511	16
Weedin v. *Chin Bow*, 274 U.S. 657, 668	10
Wetmore v. *Markoe*, 196 U.S. 28, 76-77	10
White v. *United States*, 191 U.S. 545, 551	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Robert D. Elder and Greene Chandler Furman, petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 15, 1950.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia (R. 72) has not been officially reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION.

The judgments of the United States Court of Appeals for the District of Columbia were entered on June 15, 1950 (R. 96). The Government's petitions for rehearing were denied October 2, 1950. Additional time for filing petition for writ of certiorari was requested by the Government and extended to January 2, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED.

1. Whether Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [under subgroups A-2, A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [subgroups B-1, C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under §§ 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

2. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are discharged effective June 30, 1947, while other nonveteran nonpreference employees are retained in such positions of Attorney, Grade P-3, in preference to such veterans "according to tenure of employment"—is in violation of retention preference rights of such veterans under applicable statutes aforesaid.

3. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are dropped and excluded from duty since June 6, 1947, while nonveteran employees are retained continuously on active duty in such positions of Attorney, Grade P-3,—is in violation of rights of such veterans under applicable statutes aforesaid.

4. Whether the above-described discharge, dropping, and/or exclusion from duty is to be regarded as in direct violation of the proviso of § 4 of the Act of August 23, 1912, and/or of the proviso of § 3 of the Act of August 15, 1876.

5. Whether, in such a reduction in force, §§ 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

6. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 6, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 6, 1947.

7. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 30, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 30, 1947.

8. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that each of these petitioners has been entitled since August, 1944, to the tenure of employment designated as permanent or classified (competitive) civil service status, and that such tenure and status has been wrongfully denied him.

STATUTES AND REGULATIONS INVOLVED.

The proviso of § 4 of the Act of August 23, 1912, § 4, 37 Stat. 413, 5 U. S. C. A. § 648, provides as follows:

> *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

This proviso immediately follows the provisions quoted herewith:

> Sec. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia * * * Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided* (*et seq. supra*) * * *

The Veterans' Preference Act of June 27, 1944, 58 Stat. 387, 5 U. S. C., Supp. V, §§ 851-869, provides in pertinent part as follows:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be

given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions.

* * * * * * * * * *

Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; * * * *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *.

* * * * * * * * * *

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Pertinent provisions of the Civil Service Commission regulations (5 Code Fed. Regs. § 20.3, Supp. 1947) are set forth *infra* under *Statement.* pp. 7-8, 12-13.

STATEMENT.

Each of the petitioners was honorably discharged from the United States Army after wartime service on active duty in the Infantry—Elder during World War I and Furman during World War II (R. 3, 50, 77). Each of the petitioners was continuously employed from August 1, 1943, through June 6, 1947, in a civilian position of Attorney, Grade P-3, in the Department of Agriculture, Washington, D. C., and had at all times efficiency ratings of

"good" or better (R. 3, 50, 78). On May 29, 1947, each of the petitioners received written notice dated May 29, 1947, stating: "A reduction in force brought about by lack of funds necessitates your being separated effective on or after June 30, 1947, c. o. b. Your last day of active duty in your present position will be June 6, 1947" (R. 4, 8, 51).

Since June 6, 1947, each of the petitioners has been dropped and excluded from duty in his position of Attorney, Grade P-3, while five women and three men, all nonveterans, have been retained in continuous employment on active duty in such positions of Attorney, Grade P-3, since June 6, 1947 (R. 48, 50-51, 23-24). On *July* 30, 1947, respondent gave each petitioner "formal notification of your separation due to reduction in force effective June 3, 1947" (R. 60, 46). The petitioners' positions have not been abolished, but have been filled by other nonveteran Attorneys, Grade P-3, who have since June 6, 1947, been continuously performing work, functions, and duties which were formerly performed by each of the petitioners (R. 50-51, 14).

The eight nonveteran Attorneys, Grade P-3, above referred to as retained in preference to the veteran petitioners, were each carried on respondent's records as "(1) Without veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service." —and were assigned *"according to tenure of employment"* to the retention subgroup A-2 of the regulations (R. 48, 51). At the same time, each of the veteran petitioners was carried on the respondent's records as "(1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter." —and assigned *"according to tenure of employment"* to the inferior retention subgroup B-1 (R. 48, 38-39).

The petitioners each sued as a plaintiff in District Court June 5, 1947, to enjoin the Secretary of Agriculture from discharging him (R. 2, 76, 7, 82). After discharge, each continued his effort, by amended and supplemental complaint, to obtain an adjudication that he had been wrongfully discharged and should be reinstated (R. 13, 49, 84-85). The District Court entered summary judgments for the defendant Secretary before answer (R. 74), stating in its opinion: "It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations." (R. 72).

On appeal, the Court of Appeals adhered to the same general thesis (R. 88, 184 F. 2d 219), upholding the paramount overall retention priority effect given "tenure of employment" by the regulations, and holding that petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, have retention preference only over employees in subgroup B-2 and lower, and have no preference whatever over any of the eight nonveterans with classified tenure in subgroup A-2 who were retained in preference to the veteran petitioners.

§ 20.3 of the Civil Service Commission regulations (12 F. R. 2850; 5 Code Fed. Regs. § 20.3 Supp. 1947), presumably promulgated pursuant to § 12 of the Act of 1944, provides that, "for the purpose of determining relative retention preference in reductions in force", employees in each "competitive level" [e. g. "Attorney, Grade P-3"]—veterans as well as nonveterans—"shall be classified *according to tenure of employment* in competitive retention groups and subgroups as follows:"

> *Group A:* All employees with equivalent of permanent or classified civil service tenure.
>
> *Group B:* All employees serving under appointments limited to the duration of the present war, or otherwise limited to a period in excess of one year.

Group C: All employees serving under appointments limited to one year or less.

Each Group, in turn, is subdivided into four subgroups:

A-1. With veteran preference unless efficiency rating is less than "Good".

A-2. Without veteran preference unless efficiency rating is less than "Good".

A-3. With veteran preference where efficiency rating is less than "Good".

A-4. Without veteran preference where efficiency rating is less than "Good".

B-1. With veteran preference unless efficiency rating is less than "Good".

B-2. Without veteran preference unless efficiency rating is less than "Good". * * * *

In case of a reduction in force the regulations require (§ 20.8) that within each "competitive level" [e. g. "Attorney, Grade P-3"] employees shall be released by starting with the lowest subgroup, C-4, and proceeding upward in inverse order—C-4, C-3, C-2, and so on, releasing all employees in each lower subgroup before proceeding to the next higher subgroup, *et seq.*

REASONS FOR GRANTING THE WRIT.

I.

In upholding retention preference for nonveteran nonpreference employees having the equivalent of classified civil service tenure under subgroups A-2, A-4, over veterans' preference employees whose efficiency ratings are "good" or better under subgroups B-1, C-1, —*"according to tenure of employment"* instead of according to the pro-

viso mandate of absolute retention preference for such veterans—the court below has decided an important question relating to the construction of the Veterans' Preference Act of 1944 and earlier Federal statutes, and failed to give proper effect to applicable decisions of this Court, cited *infra*, in the respects indicated.

(a) In failing to hold that the long standing retention preferences of veterans given by Congress in the proviso of § 3 of the Act of August 15, 1876, and greatly strengthened by the proviso of § 4 of the Act of August 23, 1912, have been broadened, and in no respect narrowed by the Veterans' Preference Act of 1944, and embodied in the Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-339; and in failing to hold that, whatever the scope of veterans' retention preference rights prior to the enactment of the Veterans' Preference Act of 1944, the absolute retention preference rights given by the proviso of § 4 of the Act of August 23, 1912, must be deemed to have been broadened by § 2 of the Veterans' Preference Act of 1944 to comprise the unclassified civil service and veterans' preference employees of non-classified civil service status, as well as the classified civil service and veterans of classified civil service status.

(b) In failing to find that § 2 of the Veterans' Preference Act of 1944 commands that preference in retention shall be given in the unclassified civil service, as well as in the classified civil service, and in failing to hold that § 2 of the Veterans' Preference Act of 1944 is to be regarded as a legislative recognition and declaration by Congress that the absolute retention preferences of veterans given by the proviso of § 4 of the Act of August 23, 1912, *applied in 1912 and still apply since 1944* in respect of veterans' preference in retention in the unclassified civil service, as well as in the classified civil service, and has never been confined in application to the classified civil service or veterans of classified civil service status. *Weedin* v. *Chin*

Bow, 274 U. S. 657, 668; *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

(c) In failing to uphold "the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment;" *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312; and in failing to hold that § 2 of the Veterans' Preference Act of 1944 embodies and is declarative of the general policy and long established purpose of Congress to secure substantial preference [i. e. priority in right] in retention in employment in the Government service, expressed in the absolute command of § 2 of the Act that such "preference shall be given" to designated veterans, their wives and unmarried widows, in the unclassified civil service, as well as in the classified civil service, and in the comprehensive scope defined in § 2 of the Act of 1944.

(d) In erroneously holding that: "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91; 184 F. 2d 219, 221); and in failing to hold that: "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'." *Hilton* v. *Sullivan*, 334 U. S. 323, 336.

(e) In failing to hold that the proviso of § 4 of the Act of August 23, 1912, is to be interpreted as an independent

and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases within the meaning of the language used. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; and in failing to observe and hold that this Court so construed the proviso of § 4 of the Act of August 23, 1912, in the case of *Hilton* v. *Sullivan*, 334 U. S. 323, 336.

(f) In failing to hold that tenure of employment, military preference, length of service, and efficiency ratings are to be given the "due effect" required by the *first clause* of § 12 of the Veterans' Preference Act of 1944 by their consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. Cf. *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

(g) In failing to hold that the first part of the second proviso of § 12 of the Veterans' Preference Act of 1944 is to be regarded as the congressional creation of a class of veterans' preference employees who "shall", if they have the defined efficiency ratings of "good" or better, be retained in preference to all other competing employees without regard to tenure of employment and length of service as between veterans and nonveterans. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 281; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36-37; Cf. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-336.

(h) In failing to uphold the settled rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Market Co.* v. *Hoffman,* 101 U. S. 112, 115-116; *Ex parte Public National Bank,* 278 U. S. 101, 104; and in failing to hold that the Civil Service Commission regulations, applied herein, have not accorded any meaning to the first part of the second proviso of § 12 of the Act of 1944 that is consistent with the requirements of law.

(i) In failing to hold that the first part of the second proviso of § 12 of the Veterans' Preference Act of 1944 is substantially the same as the 1912 provision which provided for an absolute retention preference without regard to tenure of employment and length of service. Cf. *Hilton* v. *Sullivan,* 334 U. S. 323, 338.

(j) In failing to hold that the first part of the *second* proviso of § 12 of the Veterans' Preference Act of 1944 is to be interpreted as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause of § 12 of the Veterans' Preference Act of 1944. *Cox* v. *Hart,* 260 U. S. 427, 435; *McDonald* v. *United States,* 279 U. S. 12, 20-21; *United States* v. *Morrow,* 266 U. S. 531, 534-535; *White* v. *United States,* 191 U. S. 545, 551; *Chesapeake & Potomac Tel Co.* v. *Manning,* 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith,* 128 U. S. 174, 181; *Minis* v. *United States,* 15 Pet. 423, 445; Cf. especially the specific application of this general rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan,* 334 U. S. 323, 335.

§ 20.3 of the CSC regulations, *supra,* attempts to give due effect to the four factors of the *first clause* of § 12 of the Act of 1944, by first segregating all the Attorneys, Grade P-3, in the "competitive level" so designated, and

then seeing that these Attorneys, Grade P-3, are "classified *according to tenure of employment*" among the categories designated as Groups A, B, and C.

"*Tenure of employment*" is thus given effect as the *overall and paramount criterion* for priority in the right to be retained, per Groups A, B, and C.

Permanent or classified tenure of employment is given supreme effect as the highest value in the scale of retention priority, per Group A.

"*Military preference*"—under the appellation "veteran preference"—is given a very secondary effect as a sort of minor abscissa within and subordinated to the overall and paramount criterion of "tenure of employment", e. g. A-1, B-1, C-1, A-3, B-3, C-3.

"*Efficiency ratings*" are given a staggered abscissa value conjointly with "military preference".

"*Length of service*" is given effect within the subgroups by remote control from § 20.2 (b).

As above stated, *all* Attorneys, Grade P-3,—veterans as well as nonveterans—are *included* in the operative effect thus given by § 20.3 of the CSC regulations to the general terms of the *first clause* of 12 of the Veterans' Preference Act of 1944. *None* of the proviso-excepted class of veterans' preference Attorneys, Grade P-3, whose efficiency ratings are "good" or better has been *withdrawn or excepted* from the operation and operative effect of such general terms of the first clause of § 12 of the Act of 1944.

The regulations of the Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. *United States* v. *Stand-*

ard Brewery Co., 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

As said by this Court in *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610:

> "The limits of the power to make regulations are well settled. (cit. cas.) They may not extend a statute or modify its provisions."

Again, in *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, this Court said:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*,

242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne, supra.*

Under the positive language of § 12, viewed in its significant relation with § 2 and § 18 of the Veterans' Preference Act of 1944 and the provisions of earlier statutes embodied in the Act of 1944, the respondent Secretary was clearly and mandatorily required to retain these veteran petitioners in their positions as Attorneys, Grade P-3, in preference to all other nonveteran nonpreference Attorneys, Grade P-3 [i.e. all Attorneys, Grade P-3, who are without veteran preference]; and respondent's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

II.

In upholding retention preference for nonveteran nonpreference employees having the equivalent of classified civil service tenure over veterans' preference employees whose efficiency ratings are "good" or better—according to tenure of employment instead of according to the proviso mandate of absolute retention preference for such veterans—the court below has decided a question of substance and general importance relating to the construction of the Veterans' Preference Act of 1944 and earlier Federal statutes which has not been, but should be, settled by this Court.

(a) The court below erred in holding, in respect of § 20.3 of the CSC regulations for reductions in force, *supra*, that: "Those classifications and the subgroups into which they were divided, which are reproduced below, [footnote 4, R. 91-93; 184 F. 2d 219, 221] were approved by us in the Hilton case. We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 1948, 334 U. S. 323, as holding to the contrary."

There was no merit in the Government's contention, thus adopted by the Court of Appeals, which was that in up-

holding the validity of the absolute retention preference of veterans of classified-permanent tenure of employment given under subgroups A-1 Plus and A-1, the Supreme Court in the case of *Hilton* v. *Sullivan* approved and affirmed the validity of the regulations for reductions in force *in toto* or "of necessity affirmed the validity of the primary division between A and B based on the tenure of employment of employees." (Govt's Brief below, p. 16) As repeatedly stated by this Court:

> "The most that can be said is that the point was in the record if anyone had seen fit to raise it. Questions that merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Kvos, Inc.* v. *Associated Press*, 299 U. S. 269, 279; *Webster* v. *Fall*, 266 U. S. 507, 511.

The public interest will be promoted by settlement in this Court of the important questions involved.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition should be granted.

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

December, 1950.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
FEB 1 1951
CHARLES ELMORE CROPLEY

No. 474

In the Supreme Court of the United States

OCTOBER TERM, 1950

MARION D. ELLIS, GEORGE CHANDLER FREEMAN,
PETITIONERS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN,
PETITIONERS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The memorandum opinion of the district court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on Oc-

tober 2, 1950 (R. 100). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Civil Service Commission's "Retention Preference Regulations," promulgated pursuant to Section 12 of the Veterans Preference Act of 1944, violate that section by providing that, in a reduction in force, non-veterans with classified civil-service status are entitled to preference over veterans without classified status.

STATUTE AND REGULATIONS INVOLVED

Section 4 of the Act of August 23, 1912 [1] (37 Stat. 413, 5 U. S. C., 1934 ed., Sec. 648) provides:

> SEC. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for

[1] Section 4 was repealed by Public Law 873, 81st Cong., 2d Sess., approved September 30, 1950.

inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

Section 18 of the Veterans Preference Act of 1944 (58 Stat. 391, 5 U. S. C. § 867) provides:

> All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Section 12 of the Veterans Preference Act of 1944 (58 Stat. 390, 5 U. S. C. Supp. III § 861) and pertinent portions of the Civil Service Commission "Retention Preference Regulations" (12 F. R. 2850, 5 CFR (1949) §§ 20.3, 20.8) are set forth in

the Appendix to the petition in No. 473, this Term (pp. 14-15, 18-21).

STATEMENT

The statement is set forth in the petition for a writ of certiorari filed by respondent in *Charles F. Brannan* v. *Robert D. Elder and Greene Chandler Furman*, No. 473, this Term, which involves the same judgment sought to be reviewed by the present petition.

ARGUMENT

The judgment of the court below (R. 96) was that, on the facts presented, petitioners were entitled to reinstatement and respondent has already filed in this Court a petition for a writ of certiorari to review that judgment. *Charles F. Brannan* v. *Robert D. Elder and Greene Chandler Furman*, No. 473, this Term. Petitioners do not claim or show that they are entitled to greater relief than the judgment below affords them. There would seem, therefore, to be no reason for this petition. If the petition in No. 473 is denied, petitioners will be satisfied; if that petition is granted, petitioners will have the opportunity to urge any proper ground as the basis for affirming the decision below. Nevertheless, we do not oppose granting this petition in the event respondent's petition in No. 473 is granted.

If the respondent's petition is denied, however, we feel this petition should not be granted, not only because petitioners have nothing to gain by the

grant but also because the decision of the court below on the question raised herein is correct. Section 12 of the Veterans Preference Act of 1944 specifically provides that "In any reduction in personnel * * * competing employees shall be released *in accordance with Civil Service Commission regulations* which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *." (Italics supplied.) The Commission promulgated its "Retention Preference Regulations" shortly after passage of the Act. (9 F. R. 13699). They have remained substantially the same to date and were approved in part by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323. This "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion" is entitled to great weight. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. Moreover, the regulations are, in relevant part, simply an extension of the practice in effect since 1923. *Hearings before the Senate Committee on Civil Service On S. 1762 and H. R. 4115*, 78th Cong., 2d Sess., p. 27. The regulations in force at the time of the passage of the Act (5 CFR (Supp. 1943) §§ 12.301-12.313) drew the same distinction between permanent and non-permanent employees as do the present regulations. See *Hilton* v. *Sullivan*, *supra* at p. 337, note 10. There is no evidence that Congress intended to change the prior practice. The statute provides only that preference em-

ployees shall be retained in preference to "competing employees." It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners.

Petitioners can derive no benefit from the proviso to Section 4 of the Act of March 3, 1912, upon which they rely so heavily. That proviso was superseded by the 1944 Act,[2] Section 18 of which saved to veterans "any rights heretofore granted to, or possessed by [them], under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." But Section 18 preserved veterans' rights under the proviso as it had been interpreted by Executive order and Civil Service Commission regulations prior to 1944. See *Hearings, supra,* at p. 27. The proviso had not then been construed to grant veterans with temporary status preference over non-veterans with superior status.[3] Rather, we have a consistent administrative construction of at least twenty-seven years standing supporting the regulations attacked. There is no evidence in the 1944 Act or in its legislative history that Congress contemplated a change in that policy; on the contrary, what evidence there is points the other way. We believe, therefore, that the decision of

---

[2] H. Rep. No. 1289, 78th Cong., 2d Sess. p. 7.

[3] E. O. 3567; E. O. 3801; E. O. 4240; E. O. 5068; E. O. 8587; E. O. 8705; E. O. 9063; Civil Service Commission "Reduction in Force" Regulations, 5 CFR (Supp. 1943) §§ 12.301-12.313.

the court below was correct and that there is no need for review by this Court.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
ARTHUR W. MURPHY,
Attorneys.

JANUARY 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 926803 435

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 15 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MEMORANDUM FOR PETITIONERS IN REBUTTAL.

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

February, 1951.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SYNOPSIS OF MEMORANDUM.

	Page
VETERANS' ABSOLUTE PREFERENCE IN RETENTION	1-13
Rights to greater relief shown	2
"Ruling" of the Commission was an unauthorized nullity	5
Who are "All other competing employees"?	10
Answers: All employees other than veterans' preference employees	11
CLASSIFIED (COMPETITIVE) CIVIL SERVICE STATUS	14-24
(A) Petitioners were entitled to probational appointment in Attorney positions in the classified civil service by reason of the competitive examinations and procedures duly authorized and given effect under the Civil Service Act of 1883, the Ramspeck Act of 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 of January 30, 1945	14-24
(B) The attempted limitation of petitioners' probational appointments to War Service Indefinite appointments by the Secretary of Agriculture was unauthorized and void, since the regulation [Sec. 17.1 (g)] under which the Secretary assumed to act was an unauthorized nullity and furnished no grounds upon which his action can be sustained	14-24
(C) After such probational appointment of petitioners and upon the Secretary's official notification to petitioners in August, 1944, of their satisfactory completion of their probationary year in Attorney positions in the classified service, classified (competitive) civil service status inured to them as a matter of law	14-24
CONCLUSION	25
APPENDIX TO MEMORANDUM:	
Statutes, Executive orders, regulations, and other functional material *in re* competitive status	27

Citations: Cases cited herein are listed in—

1. Index of veterans' *Brief in Opposition* in No. 473.
2. Index of veterans' *Petition for certiorari* in No. 474.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MEMORANDUM FOR PETITIONERS IN REBUTTAL.

STATEMENT.

In No. 473 the Secretary of Agriculture petitions for certiorari and seeks reversal of the judgment of the Court of Appeals. The above named veterans oppose certiorari in No. 473 because the judgment of the Court of Appeals, insofar as it reverses the judgments of the District Court, is correct.

In the instant Case No. 474 the veterans petition for certiorari because they seek to be afforded relief from that portion of the judgment below which was adverse to them and to enlarge their rights thereunder. They seek the writ of certiorari with respect to that portion only of the judgment below which was adverse to them, because that portion of the judgment is incorrect and expressly refuses greater and more substantial rights to which they are entitled.

ARGUMENT.

Rights to greater relief claimed and shown.

In view of the situation disclosed by the record, it is a solemn absurdity for the Secretary to ask this Court to believe that:

> "Petitioners do not claim or show that they are entitled to greater relief than the judgment below affords them. There would seem, therefore, to be no reason for this petition. If the [Secretary's] petition in No. 473 is denied, petitioners will be satisfied; * * *" (Secretary's Mem. 4).

The relief afforded by the judgment of the Court of Appeals is confined to directing conditional declaratory judgments by the District Court "to the effect that on October 27, 1947, both appellants [petitioners] were wrongfully denied reinstatement" (R. 95) and that their rights to preference in *reinstatement* under Section 2 of the Veterans' Preference Act of 1944 were violated "in the reinstatement of nonveterans in October, 1947" while at the same time petitioners were "denied reinstatement" (R. 93-94).

The veterans' petition in No. 474 and the allegations in the record show that petitioners' rights to preference *in retention* under Sections 2 and 12 have been violated by the exclusion of the petitioner veterans from duty in their positions since *June 6, 1947*, while nonveterans have been retained continuously on active duty in such positions since June 6, 1947, in preference to the veterans (R. 50-52, 48);

"that plaintiff [petitioners] is entitled to have the benefit of all compensation, benefits, and privileges that would flow from such continuity of service upon active duty. That since the defendant [respondent] has been notified of the pendency of this suit seeking an injunction against him [June 5, 1947], the defendant henceforth acts at his peril and subject to the power of the Court to restore the status [precisely invoking the rule in *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1, 17] . . . That plaintiff is entitled to all annual and sick leave, and to all within grade promotions, all within grade increases of salary, all retirement rights, and all benefits, privileges and emoluments that would normally accrue to plaintiff's benefit during the period subsequent to his wrongful and illegal separation from active duty at the close of business June 6, 1947, to and until plaintiff's restoration to such active duty" (R. 22-23, from Amended Complaint filed June 24, 1947).

The judgment of the Court of Appeals falls far short of affording the substantial relief of retention in continuous employment since June 6, 1947, to which petitioners show they are entitled (R. 22, 50-52). In fact, the Court of Appeals expressly refused such relief and held that the nonveteran nonpreference Attorneys, Grade P-3, retained since June 6, 1947, shall be given the preference in retention over the petitioner veterans (R. 91-92). The veterans petitioned the Court of Appeals for modification of this portion of the judgment which was adverse to them and to be afforded the greater and more substantial relief—both in kind and quantum—to which their allegations show they are entitled (R. 50-52, 22). Their petition below, together with the petition for rehearing of the Secretary, was denied by the Court of Appeals (R. 100).

The veterans' petition for certiorari here in No. 474 seeks the same greater and more substantial relief. In the absence of such petition for certiorari the petitioner veterans could neither be afforded relief from that portion of the judgment below which was adverse to them, *Le Tulle* v.

Scofield, 308 U. S. 415, 421, nor could they attack the decree below with a view to enlarging their own rights thereunder or of lessening the rights of their adversary. *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190-191.

The difference between the substantial *kind*, as well as *quantum*, of the relief claimed and alleged and the relatively ephemeral kind of relief afforded by the judgment below, is only too apparent. Let us suppose that each of these petitions in No. 473 and No. 474 has been denied by this Court. The mandate then goes down from the Court of Appeals to the District Court where, "if the record remains as it is," (R. 95) judgments declaring each petitioner entitled to reinstatement as of October 27, 1947, would presumably be entered and petitioners, after four years of exclusion from the Secretary's employment, go back to work for him. But the Secretary has already frankly disclosed his construction of the judgment of the Court of Appeals herein: he holds that "the court applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 as the measure of veterans' reemployment rights" (p. 6, Secretary's Petition in No. 473). Pressure is notoriously urgent upon non-defense agencies to cut expenses and payrolls. This will naturally find expression in reductions in force by reason of lack of funds. Within a month after their return petitioners may well find themselves again excluded from duty in like manner as they were since June 6, 1947. Perhaps unexpected funds may again become available and the Secretary may thereby be enabled to make appointments to positions of Attorney, Grade P-3, as before (Cf. R. 71). But it is hardly to be expected that other than nonveterans of classified civil service status would be appointed to these positions, consistent with the Secretary's unmodified construction aforesaid (Cf. R. 72). As matters stand, the right of such veterans to preference in *retention* has already been negatived by the judgment below, which would be the law in that important respect. These petitioners would be restricted to

the relatively unsubstantial right to preference in *reinstatement* established by the judgment below, alone available to them. They would have the privilege, of course, to contest the Secretary's "construction" thereof through the Federal courts to the present point—after four more years of intervening amenities. The need of these veterans and thousands of other veterans for the determination at this time, by this Honorable Court, of the greater and genuinely substantial right to preference in *retention*, is therefore critical.

The constricted limitations of the judgment below are apparent. But it would seem that, insofar as it reverses the judgments of the District Court, the judgment of the Court of Appeals rests upon a sound and tenable basis. This basis is analyzed and discussed in the veterans' *Brief for the Respondents in Opposition* in No. 473. This same Brief in No. 473 is especially cogent in support of the veterans' fundamental position in No. 474 with respect to their right to preference in *retention* as of June 6, 1947, and in support of their instant petition in No. 474. We therefore request of the Court consideration of the aforesaid Brief in No. 473 as though it were also filed as part and parcel of the petition in No. 474.

The "Ruling" of the Commission was an unauthorized nullity.

On behalf of the Secretary it is argued (Mem. 5-6):

> "The statute provides only that preference employees shall be retained in preference to 'competing employees'. It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners."

If the Commission's "ruling" had only been with respect to the rights of "men", in the sense of employees without veterans' preference in retention, there would be

no question for this Court to determine herein. The first clause of Section 12 of the Veterans' Preference Act of 1944 provides:

> "SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * *" (58 Stat. 390; 5 U. S. C. §861)

The Commission read the above first clause. It was then stricken with selective blindness. At any rate, it looked no further. In its reduction-in-force regulations it led off and followed through by giving paramount overall effect to the first factor of the general terms of the first clause—"*tenure of employment*"—by setting up retention groups A, B, and C, "*according to tenure of employment*". The regulation in question provides:

> "§20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows: * * *" (12 F. R. (2850)

The regulation thus gave paramount overall effect to that first term of the first clause with respect to the rights of *all* Federal employees—including the proviso-preferred class of veterans. But Congress did not stop enacting where the Commission stopped reading. The Congress went on to enact the significant part of the section:

> "* * * *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *"

This is a *proviso*, which counsel for the Secretary conveniently overlook. Under the settled general rule estab-

lished by this Court the Civil Service Commission is without authority to interpret this proviso other than as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause (*period*). *McDonald* v. *United States*, 279 U. S. 20-21; *Cox* v. *Hart*, 260 U. S. 427, 435; *United States* v. *Morrow*, 266 U. S. 531, 534-535; *White* v. *United States*, 191 U. S. 545, 551; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Minis* v. *United States*, 15 Pet. 423, 445; Cf. especially the application of the settled rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

In making the overall A, B, C "ruling" attacked by petitioners herein, the Commission granted superior subgroup A-2 retention preference to nonveteran nonpreference employees with classified civil service tenure of employment. The Commission made this ruling frankly "according to tenure of employment". *It thus gave effect to tenure of employment, the first of the four general terms of the first clause* of Section 12.

At the same time the Commission assigned inferior subgroup B-1 retention rights to veterans preference employees whose efficiency ratings are "good" or better, and who are credited with tenure of employment limited to the duration of the war and six months thereafter. The Commission frankly made this ruling "according to tenure of employment". *It thus gave effect to tenure of employment, the first of the four general terms of the first clause* of Section 12.

But Congress, by the above proviso, effected a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general

terms of the first clause (*period*). Under the settled rule this withdrawal is inclusive of the term "*tenure of employment*" as well as of the term "*length of service*". Cases above cited. Cf. *Hilton* v. *Sullivan, supra.*

Petitioners are admittedly members of the proviso-excepted and preferred class of veterans to whom the settled rule is applicable (R. 39, 50, 48). The regulation of the Commission which thus gave effect to the term of tenure of employment violated the proviso and did not carry into effect the will of Congress as expressed in the statute. As stated by this Court:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

The regulations of the Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. *United States* v. *Standard Brewery Co.*, 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

Section 2, in expressing and embodying the general policy and purpose of the Act of 1944, commands that preference in retention, in reinstatement, in appointment, etc., shall be given to veterans in civilian positions in the unclassified civil service as well as in the classified civil service. This plain command in itself eliminates any apocryphal "construction" carried over from the notion that the veterans' preference in retention under the proviso of §4

of the Act of August 23, 1912, applied only to the classified civil service, or that it applied only to veterans of classified civil service *status* or tenure of employment. See pp. 9-12 of petition in No. 474. See, in particular, the veterans' *Brief in Opposition* in No. 473. Decisions referred to herein are listed in the Index of the Petition in No. 474 and of said Brief in No. 473.

It is there shown that Section 2 grants and prescribes preference in retention as an absolute grant to four primary classes of veterans. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12, *supra*, Congress further prescribes a single condition which expressly limits, to a special sub-class defined as veterans' "preference employees whose efficiency ratings are 'good' or better," the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2. This minimum of "good" efficiency ratings is the only condition prescribed by Congress with respect to the otherwise absolute preference in retention; and the condition is significantly prescribed as a part of the *proviso* which withdraws and excepts this preferred sub-class of veterans' preference employees from the operation and operative effect of the general terms of the first clause relating to tenue of employment as well as length of service.

As pointed out in another connection by this Court in *Hilton* v. *Sullivan*, *supra*, p. 335, the general term "military preference" in the first clause has a distinctly recognizable function "as between veteran and veteran" in the four successive grades of military preference provided in Section 2. The general term "military preference" serves in the determination of relative retention preference as applied *between veteran and veteran* in the same manner as tenure of employment, length of service, and efficiency ratings. But it is implicit in the interpretation adopted by this Court in *Hilton* v. *Sullivan* that none of the general

terms of the first clause may be given any effect whatever as between veteran and nonveteran, but only as between nonveteran and nonveteran and as between veteran and veteran. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. Thus, as between veterans and nonveterans, the proviso-preferred sub-class of veterans' preference employees whose efficiency ratings are "good" or better is in similar fashion withdrawn and excepted from the operative effect of any higher efficiency ratings possessed by a nonveteran nonpreference employee.

It boils down to this: So long as the efficiency ratings of a veterans' preference employee in a civilian position are "good" or better—that specified efficiency rating is the only condition prescribed by Congress for the absolute retention preference right of that veteran to be retained in that position "in preference to all other competing employees" (proviso of §12, *supra*).

Who are "All other competing employees"?

There is nothing esoteric about this phrase or about any of the words in it.

Under elementary principles the intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture, *Thompson* v. *United States*, 280 U. S. 420, 442. The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them: *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

"*All other competing employees*" thus means all competing employees *other* than preference employees, *United States* v. *Mescall*, 215 U. S. 26, 31-32. This meaning is unnecessarily corroborated by the correlative use of the words

"competing nonpreference employees" in the next ensuing sentence of the second proviso of Section 12.

According to *Black's Law Dictionary*, 3d Ed.: "*Compete.* To contend emulously, to strive for the position for which another is striving." Citing a decision involving civil service positions. *People* v. *Chew*, 67 Colo. 394, 179 P. 812, 813.

"Competing", in its natural import and usual and most ordinary sense according to *Webster*, means "seeking or striving for the same thing, position or reward for which another is striving", to-wit, as here the position of Attorney, Grade P-3, occupied by each of the petitioners and in which each has been supplanted by other employees "competing" for the position they are striving to regain.

Bearing in mind the word "*other*" in this connection, any employee who is not a veterans' preference employee, and who is serving as an Attorney, Grade P-3, or who is ready and willing to be appointed to or serve in such position, falls within the natural meaning of "competing" for the position against these petitioners. *People* v. *Chew, supra.*

As above indicated, the Civil Service Commission was wholly without authority to give any effect to tenure of employment in any situation involving the absolute right to be retained given to a veterans' preference employee whose efficiency ratings are "good" or better. *A fortiori*, the Commission was without authority to evade the Congressional mandate by injecting any phase of *tenure of employment* into the natural import and most ordinary sense of the words "all other competing employees" used by Congress in the proviso. When the Commission did so here, it modified, altered, and changed in a radical fashion the meaning commonly attributed to these words. As stated by this Court:

> "The limits of the power to make regulations are well settled. (cit. cases) They may not extend a statute or modify its provisions." *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

Counsel for the Secretary argue (Mem. 5) that: "This 'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion' is entitled to great weight." Citing *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

But as said by the Court in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 742:

> "Of course, this Court is not bound by administrative mistakes."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S., 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. See, also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, *supra*, 297 U. S. 129, 143; and other cases cited *supra*.

If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne*, *supra*.

Under the positive language of Section 12, viewed in its significant relation with Sections 2 and 18 of the Veterans'

Preference Act of 1944 and the provisions of earlier statutes embodied in the Act of 1944 [See pp. 9-12, Petition in No. 474] the respondent Secretary was required to retain these petitioner veterans in their positions as Attorneys, Grade P-3; and the Secretary's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

In *Hilton* v. *Sullivan*, 334 U. S. 323, 337, the Court's footnote 10 points out that the assignment of employees of classified (permanent) tenure to the "higliest retention status" under Group A and the assignment of employees of limited tenures to lower retention status, as under Group B, was "regardless of veterans' preference and of efficiency ratings." In the Hilton case all the employees involved were of classified tenure of employment and only the question of giving effect to "length of service" was presented. Nevertheless, the Court's footnote 10 is indicative of its awareness of the disregard and violation inherent in both the 1943 and 1947 regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenures.

The 8 days notice of exclusion was a nullity.

Did the eight days' notice given petitioners May 29, 1947, of their exclusion from duty from and after June 6, 1947 (R. 6, 51-52, 78-80) violate their rights under Section 14 of the Act of 1944?[1]

If so, such notice operated to create a rule out of harmony with the statute and was a mere nullity—void *ab initio*. *Manhattan General Equipment Co.* v. *Commission of Internal Revenue*, 297 U. S. 129, 143, and other cases cited *supra*.

---

[1] "SEC. 14. No permanent or indefinite preference eligible who has completed a probationary or trial period * * * shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days advance notice * * * for any such proposed action; * * *" (58 Stat. 387)

Petitioners are entitled to classified competitive status.

Counsel for the Secretary argue that petitioners are only "temporary employees" (Mem. 6). This assumption of petitioner's tenure of employment is not borne out by the record (R. 15-17, 55-57, 36). According to the Secretary's averments, each of the petitioners is serving under a "*War Service Indefinite Appointment*" * * * for the duration of the present war and for six months thereafter" (R. 36). It is alleged in petitioners' Amended Complaint (R. 15-16):

> (e) That plaintiff [petitioners] received and was entitled to receive a probational appointment through said open competitive examination and under such appointment was placed on active duty on or about August 1, 1943, * * *
>
> (f) That said appointment was stated to be limited to the duration of the war and six months thereafter, but it was not limited to one year or less nor for any period that can be accurately described as other than indefinite, since the war is still officially in esse and may well continue indefinitely, even beyond the reasonable hope of lifetime of both plaintiff and formal defendant in this suit, before being declared officially at an end, and plaintiff has already served for four years less two months under such appointment; that such appointment does not come within the definition of a "temporary appointment" (Section 2.114, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register), and accordingly such appointment is mandatorily a probational appointment pursuant to Section 2.113, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register, which provides: "Probational appointment. (a) A person selected for other than temporary appointment shall be given a probational appointment. The first year of service under this appointment shall be a probationary period . . ."
>
> (g) That plaintiff successfully completed said probationary period of one year and was officially notified

of his completion thereof, and has satisfactorily served three years less two months in addition thereto; * * * (R. 15-16)

The question whether Attorneys, such as petitioners, are entitled to classified (competitive) civil service status is of importance to lawyers, the public, and the Government (p. 4, Petition in No. 474).

1. Are Attorney positions excepted from competitive status by the new Civil Service Rules effective May 1, 1947?[2] . . . If so——

(a) The petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, are entitled *under such rules* to be retained in preference to the eight nonveteran nonpreference Attorneys, Grade P-3, thus shown to be erroneously designated and erroneously retained by respondent as

"(1) Without veteran preference. (2) Serving under an appointment with the equivalent of permanent *competitive status* in the *classified* civil service." (R. 48, 51) [Emphasis supplied.]

(b) Being excepted from such competitive status in the classified civil service, Attorneys in such positions could not be classified in any superior retention subgroup A-2 as of such competitive status or tenure of employment under the regulations for reduction in force.

---

[2] §6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule A.* The following positions are those excepted from the competitive service * *
(ii) Cooks * *
(iv) Attorneys.
(v) Chinese, Japanese, and Hindu interpreters. * * (12 F. R. 2837, §6.4.)
§1.1 *Positions and employees affected by these Rules.* (a) These rules shall apply to all positions in the competitive service. * * The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom. * *
(b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. * * A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or the Civil Service Rules. (12 F. R. 2831, §1.1)

2. If any Attorneys are entitled to classified competitive civil service status, are petitioners so entitled?

Applicable facts.

Each of the petitioners was one of 14,000 lawyers who took and one of 2,000 who passed the written and oral competitive examination given by the Board of Legal Examiners in September, 1942, and January, 1943 (R. 15, 55-56, 3).

As a result of such competitive examination each was one of 2,000 placed on the Civil Service Commission register of Attorney eligibles (R. 55-57, 66, 15).

Each was certified for probational appointment as such Attorney eligible by the publication of this register pursuant to Sec. 17.8 *Register of eligibles.* of the Regulations of the Board of Legal Examiners, adopted January 30, 1943. (R. 56-57, 15) [Sec. 17.8 is set out in full in Appendix.]

Each was appointed from this register pursuant to Sec. 17.8, *supra*, to an Attorney position in the classified civil service, responsive to the competitive examination (R. 56-57, 15-18, 3).

Each served satisfactorily on active duty from August 1, to June 6, 1947, in an Attorney position which by express authorization of the Ramspeck Act, was covered into the classified civil service by Executive Order No. 8743 of April 23, 1941, and so remained in the classified civil service until excepted therefrom May 1, 1947 (R. 3, 50, 57).

Each satisfactorily completed his probationary period of one year in such Attorney position in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3).

Nevertheless the Secretary insists that petitioners were not and are not entitled to probational appointment and

classified (competitive) civil service status; and the courts below so held (R. 89, 90). The Court of Appeals held (R. 90) that petitioners' status or tenure was governed by paragraph (g) (5 Code Regs. §17.1 Cum. Supp. 1943) of the "*regulations of the Board of Legal Examiners*", which the Court of Appeals said was the regulation in effect at the time petitioners were appointed [August 1, 1943] and that: "It follows that throughout the period of his [petitioners'] employment he was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter" (R. 90-91). The Court of Appeals also said (R. 90) that the appointment of attorneys subsequent to March 16, 1942 was governed by said regulation. The following is the regulation adopted on March 16, 1942.

Section 17.2 *Procedure prior to the establishment of registers* of the *Regulations of the Board of Legal Examiners*, adopted *March 16, 1942* (7 Federal Register, p. 2201), provides in pertinent part as follows:

> "SEC. 17. *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

The Secretary avers (R. 36) that this regulation was "adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July 1, 1943."

No authority, competent or otherwise, has been adduced, nor does any appear, for the Legal Examining Section to adopt or amend or determine such regulation or regulations, or for the *Legal Examining Section* to take over the

functions of the Board of Legal Examiners. Prior to July 1, 1943, the only authority to make or amend the *Regulations of the Board of Legal Examiners* appears to be provided by Executive Order No. 8743 of April 23, 1941, set out in the Appendix.

The *Board of Legal Examiners* created and empowered by EO 8743 is seen to be a responsible and autonomous body obligated to *consult* with the Civil Service Commission in respect of such regulations, etc., but in no way bound by any advice or orders of the Commission in any part of its duties. The Commission was not given any authority by the President with respect to such regulations.

The Commission recognized this situation and expressly excepted and disqualified its own *War Service Regulations* from any application in connection with Attorney positions, when it adopted the following provision.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission provides in pertinent part as follows:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

It is further to be observed that the *War Service Regulations* were adopted by the Civil Service Commission pursuant to the authority of Executive Order No. 9063 of February 16, 1942, which expressly authorized the Civil Service Commission alone "to adopt and prescribe such special procedures as it may determine to be necessary" in such wartime emergency. The *Board of Legal Examiners* itself had no authority to adopt and prescribe any such special procedures under Executive Order No. 9063 as it erroneously presumed to assert in adopting and prescribing Sec. 17.2 *Procedure prior to the establishment of registers, su-*

pra. It had only the specific authority to determine regulations and procedures in such manner as to effectuate the competitive purposes contemplated and provided for in Executive Order No. 8743 pursuant to the Ramspeck Act. On the other hand, the Board of Legal Examiners was engaged in the performance of its legitimate and authorized functions when it adopted and prescribed Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 F. R. 2141), pursuant to which petitioners were certified for probational appointment, appointed, and acquired classified (competitive) civil service status under the authority of the Ramspeck Act of 1940 and the Civil Service Act of 1883 (R. 55-57).

The statutes, Executive orders, regulations, and other functional material in this behalf are set out in chronological order in the Appendix to this Memorandum.

The attention of the Court is invited to the following significant points:

I. The Board of Legal Examiners was without authority to determine, adopt, or prescribe any special procedures or regulations under Executive Order 9063 or to provide that any "appointments shall be effected under Executive Order 9063", all of which the Board of Legal Examiners erroneously assumed to do when it promulgated Sec. 17.2 *Procedure prior to the establishment of registers, supra*, on March 16, 1942. The said Sec. 17.2 was therefore a nullity.

II. The Board of Legal Examiners was likewise without authority in assuming to repromulgate, adopt, or prescribe the above Sec. 17.2(g) as Sec. 17.1(g) of the Regulations of the Board of Legal Examiners which the Board promulgated April 23, 1943, in the form of a connected code of previously adopted regulations wherein it used the same text and terms of the former Sec. 17.2(g), but omitted therefrom the subhead caption "*Procedure prior to the establishment of registers*" and promulgated Sec. 17.1(g) without this or any other subhead. As more clearly shown

under the following points, the Board of Legal Examiners was equally without authority to adopt or prescribe either Sec. 17.2(g) or Sec. 17.1(g). Each and both of such regulations was thus a nullity and furnished no authority for the Secretary's limitation of the petitioners' probational appointments to "War Service Indefinite Appointments" as he erroneously assumed to do under the said Sec. 17.1(g) of the Regulations of the Board of Legal Examiners (R.36).

III. By the express terms of Executive Order 9063 it is provided:

> "1. The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special procedures as it [alone] may determine to be necessary * * * for all departments * * *".

IV. By Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly pursuant to E O 9063, *supra*, the Commission prescribed that:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

This War Service Regulation Sec. 18.11 was still in effect until 1946—long after August, 1944, when petitioners were officially notified of their satisfactory completion of their probationary year of service, whereupon classified (competitive) civil service status inured to each of them as a matter of law (R. 15-16, 55-57).

V. By Executive Order No. 9063 it is also expressly provided:

> "2. Persons appointed *solely* by reason of any special procedures adopted under authority of this order to positions subject to the Civil Service Act and Rules shall not thereby acquire a classified (competitive)

civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." [Emphasis supplied]

(a) Petitioners were not appointed *solely*, or at all, by reason of the *War Service Regulations*, for the reason that in Sec. 18.11 thereof, *supra*, the Civil Service Commission explicitly withdrew the *War Service Regulations* from any application to matters connected with the province of the *Board of Legal Examiners*, i. e., recruitment and appointments to Attorney positions and in the classified civil service and matters related thereto.

(b) Sec. 17.2(g) and Sec. 17.1(g), which in terms purported to authorize employing agencies to make appointments limited to the duration of the war and six months thereafter, were unauthorized and a nullity because such appointments were by Executive Order 9063 required to be effected "*solely* by reason of . . . special procedures adopted under authority of this order", E O 9063, and in addition the Civil Service Commission itself alone was expressly designated and "authorized to adopt such special procedures" under E O 9063.

(c) Since the President in E O 9063 deemed it advisable and saw fit explicitly to restrict to the *Civil Service Commission*, itself and alone, the authority to adopt and prescribe special procedures, which would confer authority on employing agencies authority to limit appointments, made *solely* by reason of such special procedures, to the duration of the war and six months thereafter, it is not to be presumed that the President intended to clothe any other Commission, officer, or Board such as the autonomous Board of Legal Examiners, with such comprehensive authority to adopt special procedures which would in turn authorize employing agencies to limit probational appointments in the classified civil service to the duration of the war and six months thereafter.

(d) If the Board of Legal Examiners assumed to adopt Sec. 17.2(g) or Sec. 17.1(g) of its regulations partly under E O 8743 and partly under E O 9063, this would not comply with the President's requirement in E O 9063 that only appointments effected *solely* by reason of such special procedures adopted by the Commission under authority of E O 9063 may, in the discretion of the Commission, be limited to the duration of the war and six months thereafter. Sec. 17.2(g) and Sec. 17.1(g) are not thus to be salvaged from nullity.

(e) The function of effecting limited appointments to Attorney positions in the classified civil service is foreign to and in contravention of the essential purpose and policy of the Ramspeck Act and Executive Order No. 8743, which contemplate and authorize in a very particular sense procedures designed to qualify competitive applicants for probational appointment and classified (competitive) civil service status, on a par with the status enjoyed by other Federal employees.

VI. Executive Order No. 9358 of July 1, 1943, provided that: "Subject to the provisions of this order, Executive Order No. 8743 as amended shall remain in effect." EO 9358 also provided that "until further order the administration of the civil service laws in their application to attorney positions in the classified civil service and to the incumbents of such positions shall vest in the Civil Service Commission. The Commission shall have authority to determine the regulations and procedures governing the recruitment and examination of applicants for attorney positions and the selection, appointment, promotion, and transfer of attorneys in the classified civil service * *"

(a) It does not appear in the Federal Register or elsewhere that the Civil Service Commission ever adopted any special procedures or regulations with respect to Attorneys or Attorney positions at any time between September,

1942, and August, 1944, when petitioners presumably acquired competitive status. Nor does it anywhere appear that the Commission officially adopted the Regulations of the Board of Legal Examiners or officially prescribed any authority for the utilization of such regulations as regulations of the Commission or otherwise.

(b) It vaguely appears from the averments on behalf of the Secretary that an obscure subdivision, unknown to the Federal Register, or any duly adopted regulation, i. e., a "Legal Examining Section" of the Commission, assumed to act under the above Sec. 17.1(g) of the Regulations of the Board of Legal Examiners and assumed to "authorize" the Office of the Solicitor of the Secretary of Agriculture to appoint each of these petitioners to a * * *

> "War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the Regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July, 1943" (R. 36)

Surely, in a Government of laws, subordinate and personnel clerks of a subdivision of the Civil Service Commission and of an executive Department, assuming to perform official acts under regulations shown to be devoid of appropriate authorization, cannot successfully clothe their unauthorized administrative acts with such *de facto* validity as to set at naught the long considered purpose and carefully determined policy which minds of distinction have sought to effectuate for their professional younger brethren through the Ramspeck Act of 1940 and the Civil Service Act of 1883.

The statutes, Executive orders, regulations, and other functional material relevant to the matter of competitive status are set out in the Appendix hereto. Such functional material serves to disclose the competitive purpose and effect of the action of Congress and the Executive in the

years before September, 1942, when the competitive examination of these petitioners and 14,000 others was held, before January 30, 1943, when Sec. 17.8 *Register of* [Attorney] *eligibles* was adopted, extending into February, 1943, when petitioners were placed on the register of Attorney eligibles and thereby certified for probational appointment to Attorney positions in the classified civil service (R. 55-57). These considerations leave open no other conclusion than that the Congressional and Executive intention and applicable authority required probational appointment of petitioners to these Attorney positions in the classified civil service, and that respondent was without authority to impose a war service limitation or any other limitation upon such probational appointment. Such intention and authority required that, immediately upon official notification of the satisfactory completion of their probationary year of service in such positions in the classified civil service, classified (competitive) civil service status should forthwith inure to each of the petitioners as a matter of law.

Under the circumstances the Secretary was in error in attempting to limit the petitioners' probational appointments to "War Service Indefinite Appointments" (R. 36) pursuant to inapplicable and/or unauthorized regulations and procedures; and his action in that connection was consequently unauthorized and a nullity. The grounds upon which the respondent acted were not those upon which his action can be sustained and an order cannot be sustained if an agency has misconstrued the law. *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95.

(A) Petitioners were entitled to probational appointment in Attorney positions in the classified civil service by reason of the competitive examinations and procedures duly authorized and given effect under the Civil Service Act of 1883, the Ramspeck Act of 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 of January 30, 1945.

(B) The attempted limitation of petitioners' probational appointments to War Service Indefinite appointments by

the Secretary of Agriculture was unauthorized and void, since the regulation [Sec. 17.1 (g)] under which the Secretary assumed to act was an unauthorized nullity and furnished no grounds upon which his action can be sustained.

(C) After such probational appointment of petitioners and upon the Secretary's official notification to petitioners in August, 1944, of their satisfactory completion of their probationary year in Attorney positions in the classified service, classified (competitive) civil service status inured to them as a matter of law.

CONCLUSION.

The judgment of the Court of Appeals, insofar as it reverses the judgments of the District Court, is correct. The petition of the Secretary of Agriculture for certiorari in No. 473 should therefore be denied.

In certain other respects, above indicated, the judgment of the Court of Appeals is in error and withholds greater and more substantial relief to which these petitioners are shown to be entitled. The public interest will be promoted by settlement in this Court of the important questions involved. The veterans' petition for certiorari in No. 474 should therefore be granted.

Respectfully submitted,

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

February, 1951.

APPENDIX TO MEMORANDUM.

The Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403 et seq., 5 U. S. C. § 632 et seq., provides in pertinent part as follows:

SEC. 7. No officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the classes of employees existing on January 16, 1883, or that may thereafter exist, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. Nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by * * *

* * * * * * * * * *

SEC. 2. * * *

Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First. For open, competitive examinations for testing the fitness of applicants for the public service classified on January 16, 1883, or thereafter, or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which shall fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * * * * * * *

Fourth. There shall be a period of probation before any absolute appointment or employment aforesaid.

Section 1 of the (Ramspeck) Act of November 26, 1940, c. 919, Title I, § 1, 54 Stat. 1211, 5 U. S. C. § 631a, provides in pertinent part as follows:

SEC. 1. Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government. * * *

Executive Order No. 8743 of April 23, 1941, *Extending the Classified Civil Service* (1 CFR, Cum. Supp., pp. 927-929) provides in pertinent part as follows:

By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "Extending the Classified Executive Civil Service of the United States" (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows:

Section 1. All Offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.

SEC. 2. * * *

SEC. 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No. 118, 77th Congress) * * * it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to a the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and * * *

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and proce-

dures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided*, That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule VI shall be appropriately designated therein.

(g) * * *

(h) * * *

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointment of a person who has passed a non-competitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided*, That the non-competitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) * * * .

(l) The Civil Service rules are hereby amended to the extent necessary to give effect to the provisions of this section.

Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 Federal Register, p. 2141) provides as follows:

Registers; rights of eligibles who enter military service. Sections 17.8 *Registers of eligibles* and 17.9 *Rights of eligibles who enter military service* are added as follows:

SEC. 17.8 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for appointment from among those included, subject to the Board's minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add to a register others who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon a register for cause arising either before or after his original certification.

In case the life of a register is extended, the eligibles remaining on it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

SEC. 17.9 *Rights of eligibles who enter military service* (a) An applicant whose score upon a written examination confers eligibility for oral examination shall be entitled to take a qualifying oral examination or at the option of the Board to compete in a competitive oral examination in process at the time of his request, and, if recommended by the examining committee, to be included for one year among the eligibles for positions in the grade or grades for which the original written examination was given. * * *

(E. O. 8743, 6 F. R. 2117)

BY THE UNITED STATES CIVIL SERVICE COMMISSION,
H. B. MITCHELL,
President.

(SEAL)

January 30, 1943.

(F. R. Doc. 43-2582; Filed February 16, 1943; 1:41 P. M.)

Section 17.2 *Procedure prior to the establishment of registers* of the *Regulations of the Board of Legal Examiners*, adopted March 16, 1942 (7 *Federal Register*, p. 2201), provides in pertinent part as follows:

SEC. 17.2 *Procedure prior to the establishment of registers.* (a) * * * (g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby require a classified Civil Service status.

Executive Order No. 9063 of February 16, 1942 (1 CFR, Cum. Supp. pp. 1091-1092) provides in pertinent part:

* * *

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures as it may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

Section 18.5 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1457) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.5 *Appointment*—(a) * * * (b) *Status of appointees.* Persons appointed under these regulations will not thereby acquire a classified (competitive) civil-service status. Unless otherwise specifically limited such appointments may be for the duration of the present war and for six months thereafter.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.11 *Extent of regulations.*—(a) * * *. (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941.

Pertinent excerpts from the Report of the *Committee on Civil Service Improvement*, appointed by the President in Executive Order No. 8044 of January 31, 1939 (1 Cum.

Supp. pp. 456-457) and published as *House Document No. 118, 77th Congress,* are for convenience set out as follows:

(p. 1) 1. We recommend that all positions in the professional, scientific, and higher administrative services which are designated in Sections 1 (e) and 2 (a) of Executive Order 8044, with such exceptions as may be approved by the Civil Service Commission, be placed under the provisions of the Civil Service Act by Executive order; and by consequence under the Retirement Act of 1920, as amended.

2. We recommend that the President include in the competitive classified service all other professional, scientific, and higher administrative positions (as defined by Executive Order 8044), formerly exempt by statute but which may now be included in the classified service by executive order under the act of November 26, 1940 * * *

(p. 2) 7. With respect to attorney positions, we recommend that the President by Executive order extend the Civil Service Act to those attorney positions which were affected by Executive Order 8044 and to those included within the authority granted him under the act of November 26, 1940, with such exceptions as the Civil Service Commission may approve.

However, two plans of procedure with respect to the induction of attorneys into the Government service are proposed, Plan A and Plan B. The plans differ on two points, as indicated below. Plan A recommends an unranked register of eligible candidates for attorney positions; rejects as unsatisfactory the present civil service system; asserts that attorney positions present a unique problem in the professional service which must be solved individually rather than by application of a general formula. It points out that written examinations are not trustworthy guides to capacity for many of the tasks to be performed; that present certification procedure makes it extremely difficult for the candidate to exercise any choice as to the department or agency in which he will work; and finally that until the Civil Service Commission is better acquainted with the attorney problem through practical experience the entrance into the merit system should not be confused with civil-service procedures thought to be inadequate to the attorney problem.

(p. 15) * * * attorneys are the principal class of employees affected by Executive Order 8044. * * * Two separate civil-service systems are unthinkable. * * *

(p. 29) The attorney positions total well over half of the positions withheld from the classified civil service by Executive Order No. 8044 (table VI, supra, p. 33).

The Committee is in entire accord as to the necessity that the legal positions of the Government be made a career service. * * *

(p. 31) Many recommendations from sources entitled to the greatest respect have urged a prompt inclusion of the attorney positions within the merit system. These include * * *

LIBRARY
SUPREME COURT, U.S.

FILED
APR 10 1951

No. 474

In the Supreme Court of the United States

OCTOBER TERM, 1950

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
PETITIONERS,
v.
CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Summary of Argument	3
Argument	5
I. The retention preference regulations of the Civil Service Commission afford veterans all the preference in retention required by Section 12 of the Veterans' Preference Act of 1944 and are valid	6
A. Legislative history and terms of Section 12	9
B. The Commission's power to implement Section 12	19
C. The 1912 Act	20
II. Respondents never acquired competitive status and were properly classified in sub-group B–1 on the retention register	26
III. Respondents' separation was in all other respects in accordance with law	38
Conclusion	41
Appendix	43

CITATIONS

Cases:	
Billings v. *Truesdell*, 321 U. S. 542	17
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410	19
Commissioner v. *South Texas Co.*, 333 U. S. 496	19, 20
Helvering v. *Wilshire Oil Co.*, 308 U. S. 90	19
Hilton v. *Sullivan*, 334 U. S. 323	10, 20, 24
United States v. *American Trucking Assns.*, 310 U. S. 534	17
Statutes:	
Act of August 23, 1912 (37 Stat. 413, 5 U. S. C. 1934 ed. § 648):	
Section 4	2, 4, 20, 21, 24, 26, 45
Civil Service Act of 1883, Sec. 7, 22 Stat. 406, 5 U. S. C. § 638	41
Public Law 873, 81st Cong., 2d Sess.	26
Ramspeck Act, 54 Stat. 1211, 5 U. S. C. § 631a	29, 41
R. S. 1753, 5 U. S. C. § 631	41

939543—51——1

Statutes—Continued Page

Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. and 5 U. S. C. Supp. III, §§ 851 *et seq.*):
Section 11 19
Section 12 ..... 2, 4, 6, 9, 11, 13, 18, 19, 21, 43
Section 14 ..... 2, 38, 39, 44
Section 18 ..... 2, 35, 45

Miscellaneous:
1949 C. S. A. 76 23
1941 C. S. A. 108 23
Civil Service Commission, Acts, Rules and Regulations, Annotated (amended to October 31, 1943), p. 171 ..... 34, 37
Civil Service Commission "Retention Preference Regulations" (12 F. R. 2850, 5 CFR (1949) 3, 7
Section 20.3 ..... 7, 40
Section 20.8 3
Section 20.10 40
Civil Service Regulations, 7 F. R. 7725 36–37
Civil Service Regulations, Part 12, Reductions and Removals, (8 F. R. 10921, 5 CFR (Supp. 1943) Sections 12.301–12.313 9
5 C. F. R., Supp. 1943, Section 12.304 23
19 Comp. Gen. 955 39
28 Comp. Gen. 526 39
90 Cong. Rec. 3503 14
90 Cong. Rec. 3505 ..... 9, 10
Departmental Circular No. 146, U. S. Civil Service Commission October 22, 1936 22
Executive Order No. 3567, October 24, 1921 21
Executive Order No. 3801, March 3, 1923 21
Executive Order No. 4240, June 4, 1925 21
Executive Order No. 5068, March 2, 1929 21–22
Executive Order No. 8743 (6 F. R. 2117, 3 CFR Cum. Supp. 927) 2, 30, 36, 37, 40, 41, 51
Executive Order No. 9063 (7 F. R. 1075, 3 CFR Cum. Supp. 1091) 3, 31, 35, 36, 55
Executive Order No. 9230 (7 F. R. 6665, 3 CFR Cum. Supp. 1201) 37
Executive Order No. 9358 (8 F. R. 9175, 3 CFR, Supp. 1943, p. 30) 33, 37
Executive Order No. 9830 (12 F. R. 1259, 3 CFR, Supp. 1947, p. 107) 26, 41
14 F. R. 4365 8
Hearings Before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 11–15, 25
Hearings Before the Subcommittee of the House Appropriations Committee on the 1949 Department of Agriculture Appropriations Bill, 80th Cong., 2d Sess.:
Page 252 29
Pages 258–260 29

Miscellaneous—Continued Page

Hearings Before the Subcommittee of the Senate Appropriations Committee on the 1948 Department of Agriculture Appropriations Bill, 80th Cong., 1st Sess. pp. 108–110 29
H. Rep. No. 1289, 78th Cong., 2d Sess 9, 10, 14, 16, 21
H. R. 4115, 78th Cong., 2d Sess 14, 16
H. R. 5101, 76th Cong., 1st Sess 16
H. R. 5147, 76th Cong., 1st Sess 16
Minute of the Civil Service Commission, August 11, 1932 (1934 CSA 54) 23
Regulations of the Board of Legal Examiners, promulgated June 27, 1941, 6 F. R. 2577:
Section 17.1 30
Section 17.2 30
Section 17.3 32
Regulations of the Board of Legal Examiners, as amended August 6, 1941, 6 F. R. 4091 ..... 31, 32
Regulations of the Board of Legal Examiners, as amended August 14, 1941, Secs. 17.4, 17.5, 6 F. R. 4181 32
Regulations of the Board of Legal Examiners, as amended March 7, 1941, 6 F. R. 5799 32
Regulations of the Board of Legal Examiners, as amended March 16, 1942, F. R. 2201 ..... 32, 34
Regulations of the Board of Legal Examiners, as amended May 4, 1942, Section 17.7, 7 F. R. 5853 32
Regulations of the Board of Legal Examiners, as amended January 30, 1943, Sec. 17.8, 8 F. R. 2141 32
Regulations of the Board of Legal Examiners (as revised and amended, April 20, 1943, 8 F. R. 5207, 5 CFR Cum. Supp. §§ 17.1 *et seq.*) 2, 32
Section 17.1 ..... 27, 28, 34, 35, 36, 46
Section 17.6 50
Sen. Rep. 907, 78th Cong., 2d Sess 9, 11, 14

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER AND GREENE CHANDLER FURMAN, PETITIONERS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

OPINIONS BELOW

The memorandum opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1950 (R. 96). A petition for modification of the opinion and judgment, filed on June 30, 1950 (R. 103–112), was denied on October

2, 1950 (R. 100). The petition for a writ of certiorari in No. 474 was filed on December 29, 1950. Certiorari was granted on February 26, 1950 (R. 114). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Civil Service Commission's "Retention Preference Regulations" promulgated pursuant to Section 12 of the Veterans' Preference Act of 1944 violate that section by providing that, in a reduction-in-force, non-veterans with the equivalent of classified civil-service status are to be retained in preference to veterans holding war service appointments limited to the duration of the war and six months thereafter.

2. Whether, despite the terms of their appointments and the Regulations of the Board of Legal Examiners in effect at the time of those appointments, petitioners Elder and Furman acquired classified civil-service status.

STATUTES AND REGULATIONS INVOLVED

Sections 12, 14, and 18 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390, 391, as amended, 5 U. S. C. and 5 U. S. C., Supp. III, §§ 861, 863 and 867), Section 4 of the Act of August 23, 1912 (37 Stat. 413, 5 U. S. C. 1934 ed. § 648) and pertinent portions of the Regulations of the Board of Legal Examiners (8 F. R. 5207, 5 CFR Cum. Supp. §§ 17.1 *et seq.*), of Executive Order No. 8743 (6 F. R. 2117, 3 CFR Cum. Supp. 927) and of

Executive Order No. 9063 (7 F. R. 1075, 3 CFR Cum. Supp. 1091) are set forth in the Appendix, *infra*, pp. 43–56.

Pertinent portions of the Civil Service Commission "Retention Preference Regulations" (5 CFR (1949) §§ 20.3 and 20.8) are set forth, *infra*, pp. 7–8, and in the Appendix to our brief in No. 473 at pp. 36–38.

STATEMENT

The statement is set forth in the brief for the Secretary of Agriculture in No. 473. The Secretary of Agriculture, petitioner in No. 473 and respondent in No. 474, is referred to as "the Secretary" in both this brief and that in No. 474, and Messrs. Elder and Furman, petitioners in No. 474 and respondents in No. 473, are referred to as "respondents" in both briefs.

SUMMARY OF ARGUMENT

I

The Civil Service Commission's "Retention Preference Regulations," in providing that non-veterans with the equivalent of competitive status shall, in a reduction-in-force, be retained in preference to veterans holding temporary appointments, are entirely in accord with the mandate of Section 12 of the Veterans' Preference Act of 1944.

The Commission's regulations in effect at the time that Act was passed, and for some time

before, were substantially the same as those under attack here. There is no evidence in the legislative history that Congress intended to give to veterans greater preference in retention than was afforded under those regulations; on the contrary, all the available evidence points in the other direction. Nor does the language of Section 12 compel any such reading as respondents advance; it expressly provides that "due effect" shall be given to "tenure of employment, military preference, length of service, and efficiency ratings," and the proviso, on which respondents rely heavily, merely provides for preference to all other "competing employees." In the history of the civil service, permanent employees have not been considered to compete with temporary employees. Moreover, Section 12 was adopted as drafted by the Civil Service Commission and the Commission was expressly empowered to regulate veterans' preference in reductions-in-force. Respondents have completely failed to sustain the burden of showing that the regulations are plainly erroneous, and they must, therefore, be upheld.

Similarly, the proviso to Section 4 of the Act of August 23, 1912, dealing only with permanent, classified employees—prohibiting the discharge or dropping, in a reduction-in-force, of any "honorably discharged soldier or sailor whose record in said department is rated good"—cannot now be interpreted to grant greater preference rights than it was interpreted to give at the time it

was superseded by the Veterans' Preference Act of 1944. It had never been interpreted to grant temporary veteran employees preference in retention over non-veterans holding permanent appointments.

II

If the retention regulations are valid, there can be no serious question that respondents were properly separated in accordance with those regulations, which place them in a group subordinate to permanent employees. Their claim to such permanent status is insubstantial. The war service regulations governing appointments to attorney positions at the time of respondents' appointments (in July and August 1943) specifically prohibited the acquisition of competitive status by reason of those appointments. Respondents' appointments were in fact limited to the duration of the war and six months thereafter. These war service appointment regulations were undoubtedly validly issued under the prevailing statutes and executive orders.

III

Other arguments made by respondents with respect to the validity of their separation are wholly without merit.

ARGUMENT

In our brief in No. 473 we show that the court below was in error insofar as it held that respondent's *reemployment* rights had been violated. We

are concerned here only with respondents' contentions that they were improperly separated. We contend that the Civil Service regulations governing reductions-in-force are valid and that respondents were separated in accordance with those regulations. We submit, therefore, that the judgment below, insofar as it upheld respondents' separation, should be affirmed.

I

THE RETENTION PREFERENCE REGULATIONS OF THE CIVIL SERVICE COMMISSION AFFORD VETERANS ALL THE PREFERENCE IN RETENTION REQUIRED BY SECTION 12 OF THE VETERANS' PREFERENCE ACT OF 1944 AND ARE VALID

Section 12 of the Veterans' Preference Act of 1944 provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* * * * That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

Pursuant to Section 12, the Civil Service Commission promulgated its "Retention Preference Regulations" (12 F. R. 2850). Those regulations provide, in general, that, for purposes of determining the order in which separation shall be effected, employees shall be divided into three groups—A, B and C—according to tenure of employment. Group A, which has the highest retention priority, is composed of employees with competitive status or, in the case of positions such as that of attorney which are "excepted" from examination requirements, who hold appointments without time limitation. Group B, which has the second highest priority, is composed of employees without competitive status or whose appointments are limited to the duration of the war and six months. Group C has the lowest priority and is composed of employees whose appointments are limited in time to one year or less. Within each group employees are further divided into sub-groups according to veterans' preference and efficiency rating. Thus, sub-groups A–1, B–1 and C–1 are composed of employees with veterans' preference and efficiency ratings of "good" or better, and sub-groups A–2, B–2, and C–2 are composed of employees without veterans' preference with "good" or better efficiency ratings.[1]

[1] The Civil Service Commission "Retention Preference Regulations for use in Reduction in Force," 12 F. R. 2850, § 20.3 provided: "For the purpose of determining relative retention preference in reductions-in-force, employees shall be

In accordance with those regulations, respondents were classified in Group B, as employees without competitive status holding appointments limited to the duration of the war and six months.

---

classified according to tenure of employment in competitive retention groups and subgroups as follows:

"Group A. All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

"A–1 Plus during one-year period after return to duty, as required by law.

"A–1 With veteran preference unless efficiency rating is less than 'Good'.

"A–2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *

"Group B. All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

"B–1 With veteran preference unless efficiency rating is less than 'Good'.

"B–2 Without veteran preference unless efficiency rating is less than 'Good'."

* * * * *

The definitions of Groups A and B were modified, in respects not material here, on July 4, 1947 (14 F. R. 4365), and, as amended, are set forth in the Appendix to our brief in No. 473.

They were further classified in sub-group B–1 (R. 44) as veterans with efficiency ratings of at least "good."

Respondents contend that Section 12 is an absolute command that all veterans with efficiency ratings of at least "good" be retained in preference to all other non-veterans holding similar positions and that the Civil Service Commission regulations are invalid insofar as they give any non-veterans a higher position on the retention register than any veteran, holding a similar position, with an efficiency rating of "good" or better. We believe, however, that Section 12 does not express such a command and that all evidence in its legislative history points to the conclusion that Congress did not intend to prefer temporary employees with veterans' preference over permanent non-veteran employees. On the contrary, the Commission's regulations are well within the discretion committed to it by Section 12 and must therefore be upheld.

A. LEGISLATIVE HISTORY AND TERMS OF SECTION 12

1. The Veterans' Preference Act of 1944 was intended, in large part, as a codification of existing Executive orders and Civil Service Commission regulations. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3, Sen. Rep. 907, 78th Cong., 2d Sess., p. 1, 90 Cong. Rec. 3505. The Civil Service Regulations in effect at the time the Veterans' Preference Act was passed (8 F. R. 10921,

5 CFR (Supp. 1943) §§ 12.301–12.313) and for some twelve years before that, gave veterans substantially the same preference in retention as is afforded by the regulations in issue here. Those regulations drew the same distinction between permanent employees and those with limited tenures. See *Hilton* v. *Sullivan*, 334 U. S. 323, at note 10, and see *infra*, pp. 23–24. The Act was, it is true, intended to strengthen veterans' preference in several respects, see *Hilton* v. *Sullivan*, *supra*, at p. 337, but each enlargement of veterans' rights was carefully noted in the legislative history.[2]

There is no evidence in that history that Congress intended to change existing law to eliminate the preference of permanent over temporary employees. The sole change in the existing law of retention preference called to the attention of Congress was concerned with veterans' preference upon the transfer of functions from one agency to another.[3] H. Rep. No. 1289, 78th Cong., 2d

[2] In explaining the bill on the floor of the House, Mr. Ramspeck, Chairman of the Civil Service Committee said (90 Cong. Rec. 3505): "This Act does not make a great many changes in the present veterans' preference, which exists largely by Executive order, but it is important, I think, that those Executive orders be given legislative status by the Congress.

"It does give some additional strength to the veterans' preference, by strengthening the Executive orders now in existence."

[3] In the statement referred to in the preceding footnote, Congressman Ramspeck enumerated the chief amendments

Sess., p. 4, Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 3, Hearings Before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess., pp. 9–10, 29.[4] In particular, the proviso of Section 12 providing for preference of veterans with "good" efficiency ratings over "all other competing employees" (*supra*, p. 6)—on which respondents rely heavily (Elder Br., pp. 15–29)—was not regarded as changing existing law. In discussing that proviso before the Senate Committee on Civil Service,

made by the proposed Act to existing law, but did not mention retention preference.

[4] At those hearings, Representative Starnes, the author of the bill, in discussing Section 12, said (pp. 9–10):

"One further broadening item in this provision of the act, in section 12, states [reading]:

"That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

"* * * That is one principle the veterans' organizations have fought for most vigorously. Oftentimes they have found agencies which have transferred or abolished their functions entirely and a new agency was set up in its place. The new agency then would leave the veterans in the cold and go out into the open labor market and recruit new appointees. It is a device which the veterans claim has been used against them to eliminate them from Government appointments, by simply abolishing the function or transfer the function and leaving the personnel out in the cold. That is one practice of ignoring veterans' preference."

Mr. Arthur S. Flemming, Civil Service Commissioner, said (Hearings, *supra*, at p. 27):

> That proviso is substantially the same as a law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923.[5]

Certainly, the understanding of the Civil Service Commission at that time was that the statute would leave retention preference substantially as it was under existing regulations. At the Senate Hearings, Mr. Flemming said (Hearings, *supra*, at p. 27):

> Section 12 is an important section because it deals with the problem of reduction in force in the Federal service.
>
> You will note the first part of the law provides [reading]:
>
> "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings."
>
> I might say that our existing reduction-

[5] On the 1912 Act, see *infra*, pp. 20–26.

in-force regulations are in harmony with that.[6]

2. Moreover, it is fair to assume from the legislative history that those connected with the legislation understood that temporary employees, and especially war service appointees like respondents, were to be preferred only over others of similar tenure. During his testimony before the Senate Civil Service Committee Mr. Flemming, Civil Service Commissioner, twice referred to the problem of war-service appointees in a manner suggesting that such employees would not have retention rights superior to those of permanent civil servants.[7] Of even greater signifi-

[6] At the time of the Senate Hearings, all the relevant portions of Section 12, including the proviso on which respondents rely, were the same as finally enacted.

[7] At p. 20 of the Hearings, in response to a question by the Chairman of the Committee as to how many people would be forced out of government jobs by returning veterans, Mr. Flemming said:

"* * * of course persons who left any of these jobs and entered the armed forces are entitled to come back to them, but a person who did not leave one of these jobs, but who has gone into the armed forces and then applies for one of these jobs, is not given the right under this act to force existing personnel out. Positions now filled by war service appointees, however, will become vacant and could only be filled as a result of a competitive examination."

* * * * *

And again, at p. 21, he said:

"* * * Since March 16, 1942, all persons recruited for the Federal service have been given war service appointments, appointments for the duration of the war and a period

cance, in view of the considerable part played by the veterans' organiaztions in the drafting of the bill,[8] is a proposed, but unadopted, amendment offered by the representatives of the Disabled American Veterans to give permanent status to disabled war-service preference eligibles (Hearings, *supra,* at pp. 46–47):

* * * * *

> Although there was mutual agreement among the three veterans' organizations concerning all of the provisions of the bill, as passed by the House, except for the La Follette amendments, I did state to the others that I intended to propose, if I had an opportunity, for the consideration of this committee, that all persons who have a 10-point civil-service preference and who hold war-service appointments should be given a permanent civil-service status. To that end I recommend that there be added the following language at the end of section 8 on page 7 [reading]:

---

of 6 months thereafter, and such of these positions as remain in the post-war period will be thrown open to competition and the incumbents, if they desire to stay in, will have to compete with returning veterans. Whether they remain or not depends upon whether or not they come out on top in that competition."

[8] Throughout the legislative history of the Act it was stressed that H. R. 4115 had the endorsement of the Civil Service Commission and the major veterans' organizations. H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 1; Hearings, *supra*, at p. 8; 90 Cong. Rec. 3503.

"Any person included in section 2 (1) who holds a war-service appointment in any Federal agency is hereby extended the status of a permanent employee."

The reason for that is that probably several thousand, but not too many thousand, service-connected disabled veterans, both of World War I and World War II, have acquired war-service appointments that last for the period of the war and 6 months thereafter, who will be considered to have been only temporary employees and whose appointments would therefore be terminated 6 months following the conclusion of this war. Most of these service-connected disabled veterans should in any event have been granted a preference and having been on the job anywhere from several months to several years and presumably having established their qualifications for the job, we think they ought to be given a permanent civil-service status.

* * * * *

Had the veterans' organizations understood the Act to mean what respondents say it does—that temporary veteran employees are protected from separation so long as any permanent non-veteran is still on the job—such an amendment would have been largely purposeless.

3. It is also important to note that the genesis of Section 12 indicates that a special status is to be accorded the Commission's views of the statute's meaning. In the 76th Congress, two bills, spon-

sored by veterans organizations, were introduced which disregarded tenure of employment, length of service, and efficiency ratings, and provided that in the case of a reduction-in-force no preference eligible was to be dismissed while a nonveteran doing similar work was retained.[9] Neither of those bills became law. Instead, in the bill which, with the endorsement of the Civil Service Commission and all the major veterans organizations, became the Veterans' Preference Act of 1944—H. R. 4115, 78th Congress—the language of the section governing reductions-in-force was that proposed by the Civil Service Commission. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 6.[10]

[9] H. R. 5101, 76th Congress, 1st Sess., endorsed by the American Legion, provided:

"SEC. 13. In the event of reductions in personnel being made in any establishment, agency, bureau, administration, project, or department, temporary or permanent, hereinbefore referred to, under the classified civil service or otherwise, no preference eligible shall be dropped, discharged, furloughed, or reduced in rank or compensation while a nonpreference eligible engaged in similar work is retained upon the former basis, except discharges made in pursuance of charges as provided in section 14 hereof."

H. R. 5147, 76th Congress, 1st Sess., endorsed by the Veterans of Foreign Wars, provided:

"SEC. 10. That when reductions are being made in any agency or project of the Federal Government, or of the District of Columbia, no preference employee shall be dismissed, suspended, furloughed, or reduced in rank or compensation while a nonveteran engaged in similar work is retained therein: * * *"

[10] The language was originally proposed in a letter of January 31, 1944, from the Civil Service Commission to Representative Starnes, author of H. R. 4115.

It would be strange to conclude, as one must if respondents' position is upheld, that the Commission, having proposed the language of Section 12 to Congress in the light of the previous proposal by the veterans' organizations, and having urged its adoption, had immediately after the passage of the Act misconstrued it in this important respect. On the contrary, the contemporary understanding of the Commission expressed in its subsequent regulations must be awarded great weight in any attempt to divine Congressional intent and purpose. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Billings* v. *Truesdell*, 321 U. S. 542, 552, 553.

The complete absence in the legislative history of any suggestion of support for respondents' contention is more than usually significant in view of the radical nature of the change they insist was made. Respondents are, after all, asserting the novel proposition that temporary employees, whose appointments may have been limited to less than a year, must be retained in preference to non-veteran employees with unlimited tenure. It cannot be disputed that such preference has never existed under the civil service laws; the distinction between permanent and temporary employees has always been an integral part of those laws. *Supra*, pp. 9–10, *infra*, pp. 21–24. We submit that the clearest kind of statutory directive would be needed before such traditional practices could be overturned.

4. But nothing in the wording of Section 12 compels the conclusion that, despite the administrative and legislative backgroimd we have set forth, Congress did command the Civil Service Commission to prefer veterans over non-veterans regardless of tenure of employment. The mandate to the Commission was simply that its regulations governing the release of "competing employees" give "due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, * * * That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *." *Supra*, p. 6.

This would seem to be the antithesis of such a command. For it can hardly be said that the Commission does not give *due effect* to military preference. Veterans with efficiency ratings of at least "good" are absolutely preferred over non-veterans regardless of the length of service or efficiency ratings of the latter. Veterans with permanent appointments and "good" ratings are preferred over all non-veterans. The only restriction placed on preference is that temporary employees cannot displace permanent non-veterans. The *proviso* does not give veterans with "good" ratings absolute preference over every other employee but only over "*competing employees.*" On its face, this phrasing, in view of the requirement that "due effect" be given "to

tenure of employment," certainly authorizes a ruling that men with permanent appointments are not to be considered as competitors of temporary employees. In the light of civil service history prior to the Act (*supra*, pp. 9–10; *infra*, pp. 21–24), the propriety of this reading can hardly be questioned.

B. THE COMMISSION'S POWER TO IMPLEMENT SECTION 12

Even if the foregoing part of our argument should not convince the Court that the Commission's "Retention Preference Regulations" are the only acceptable interpretation of Section 12 of the Veterans' Preference Act, we submit that those regulations are clearly within the discretion given to the Commission by Section 12 and, as the reasonable regulations of the agency charged by Congress with implementing the Act, must be upheld. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 502; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102–103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414.

Section 14 of the Veterans Preference Act authorizes the Civil Service Commission "to promulgate appropriate rules and regulations for the administration and enforcement of [the] Act." That Congress particularly intended the Commission to have broad rule-making power with respect to reductions-in-force was manifested by the fact that, instead of relying on Section 14 to give that power, it specifically provided in Section 12, the

very next section, that reductions-in-force should be carried on "in accordance with Civil Service Commission regulations." This gives "added reasons why interpretations of the Act and regulations under it should not be overruled by the courts unless clearly contrary to the will of Congress." *Commissioner* v. *South Texas Co.*, 333 U. S. at 503.

The legislative history, civil service practices, and other factors discussed above (pp. 9–19; and see *infra*, pp. 20–26) demonstrate that respondents cannot sustain their burden of showing that the regulations are unreasonable "or clearly contrary to the will of Congress." There is no support for their position in the Act's legislative history, and, against the legislative and administrative background, the argument as to the asserted "plain language" of Section 12 (Elder Br. p. 19) is clearly insufficient.

C. THE 1912 ACT

Respondents also rely heavily on the proviso to Section 4 of the Act of August 23, 1912 (*infra*, pp. 45–46), and on the language used by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 336, with respect to that statute. (Elder Br., pp. 29–33).[11] We

[11] The Court said (334 U. S. at 336):

"There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good.' Length of service in no way qualified the preference given the veteran."

do not believe that the Court intended its language to cover the situation now before it, and any reliance in this case on the 1912 Act, either as independent legislation or as indicating the reach of Section 12, is misplaced. The proviso to Section 4 had long been interpreted in the same fashion as its successor, Section 12, has now been construed by the Civil Service Commission; and it has no standing as independent legislation, having been superseded by the 1944 Act (H. Rep. No. 1289, 78th Cong., 2d Sess., p. 7).

1. Section 4 of the Act of August 23, 1912, was primarily concerned with the establishment of efficiency ratings in the classified civil service in the District of Columbia. It was accordingly first interpreted to apply only to such positions. Executive Order No. 3567, October 24, 1921. Executive Order No. 3801, of March 3, 1923, extended the preference to the classified service generally.[12] Executive Order No. 4240 of June 4, 1925[13] and Executive Order 5068 of March 2,

[12] E. O. 3801 amended Civil Service Rule 12, pertaining to reductions-in-force, by adding Section 5:

"* * * In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

[13] The Executive Order provided in part:

"* * * the following rules are hereby prescribed to govern the selection of employees for demotion or separation

1929 [14] provided that veterans with efficiency ratings of "good" were to be retained in preference to competing employees. In 1936, retention preference was extended to all agencies of the federal government. Departmental Circular No. 146, U. S. Civil Service Commission, October 22, 1936.[15]

---

from the departmental service on account of reduction in force.

"*Employees eligible for military preference*

"1 Executive Order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition."

[14] The Executive order amended Civil Service Rule 12, Section 5, to read:

"In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service."

[15] The circular read:

"The President of the United States has informed the Civil Service Commission that it is his desire that in making reductions of force the civil-service rules be applied by all agencies which are to be on a permanent basis. The provisions of section 5 of civil-service rule XII should, therefore, be

As early as 1932, the Civil Service Commission prescribed that in a reduction-in-force employees were to be separated in inverse order of their tenure of employment: first, temporary employees, next, probational employees, and, lastly, permanent employees. For purposes of applying the retention preference regulation "only those employees in the class under consideration (temporary, probational, or permanent) who are engaged in the same line of work [were] to be considered as in competition with each other." Minute of the Civil Service Commission, August 11, 1932.[16] The rule remained the same at all times prior to the passage of the Veterans' Preference Act of 1944.[17]

---

applied regardless of the place of employment, and should also be applied in the regular branches of the Government in making reductions in force in excepted positions."

[16] Civil Service Commission, Acts, Rules and Regulations (As Amended to September 15, 1934) p. 54:

"*Reduction of force; order to be followed.*—Departments and independent offices shall follow the order herein given in making dismissals from the classified service because of reduction in force: (1) All temporary employees; (2) all probational employees; (3) permanent employees. 'In making a reduction in force, only those employees in the class under consideration (temporary, probational, or permanent) who are engaged in the same line of work are to be considered as in competition with each other. The provisions of sec. 5 of rule XII apply to reductions in each of these three classes when the reduction does not require the dismissal of all employees in any particular class' (minute of Commission, Aug. 11, 1932)."

[17] See 1939 CSA 76, 1941 CSA 108; 5 CFR, Supp. 1943, § 12.304.

Thus, at no time prior to 1944 had the proviso of Section 4 of the Act of August 23, 1912, been interpreted to grant the kind of preference for which respondents contend. Rather, for at least twelve years prior to 1944 the Civil Service Commission rules were substantially identical to the regulations under attack here. Veterans with temporary appointments were not given preference over non-veterans with superior, permanent status.

The Court's discussion of the 1912 Act in the *Hilton* case does not conflict with this interpretation. The issue there involved "length of service" and did not touch on tenure or type of employment. The Court limited its consideration to "the treatment of permanent tenure civil service employees" (334 U. S. at 325), and all the employees, veterans and non-veterans, concerned in that case were classified in retention group A—"permanent employees". 334 U. S. at 326. The opinion pointed out that under the 1912 Act, as written and as interpreted in practice, "length of service in no way qualified the preference given the veteran" (334 U. S. at 336–337), but it did not make or intimate a holding that the same would be true of tenure of employment.[18] As we have shown

[18] The Court noted (334 U. S. at 337, fn. 10) that, at the time of the passage of the 1944 Act, the Civil Service Commission regulations provided that "all permanent employees, regardless of veterans' preference and of efficiency rating, [should enjoy] priority over all employees with limited tenures."

(*supra*, pp. 23–24), the prior consistent practice under the 1912 Act was to give superior retention status to permanent employees over non-permanent workers, just as it was to disregard years of service as between veteran and non-veteran permanent employees.

2. Section 18 of the 1944 Act (*infra*, p. 46) saved to veterans "any rights heretofore granted to, or possessed by [them], under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." Respondents apparently claim (Elder Br., p. 31) that this savings-clause preserves the 1912 statute, as they construe it, as a separate and independent source of retention benefits. But Section 18 preserved veterans' rights under the proviso of the 1912 Act only as it had been interpreted by Executive Order and Civil Service Commission regulations prior to 1944 (see Hearings, *supra*, p. 11, at p. 27), and respondents cannot now ask the courts to give it a fresh interpretation. In any event, there is no reason to reject, at respondents' behest, the long-standing executive construction of the 1912 Act and, in doing so, to grant them unique preference rights simply because they happened to be employed by the Government a year prior to the passage of the 1944 statute.

For the future, the 1912 Act has no role at all. As noted above (*supra*, p. 21), the proviso was specifically superseded by the 1944 Act. If there



52 556

MICROCARD

TRADE MARK ®

could have been any doubt on that point, it was removed when, in 1950, the 1912 Act was specifically repealed by Public Law 873, 81st Cong., 2d Sess. The repealing Act, like Section 4 of the 1912 Act, was concerned with establishment of efficiency ratings. There is no evidence in the legislative history that the repeal was considered to have any effect on veterans' preference legislation. We cannot suppose that Congress, so constantly concerned with veterans' preference, would have taken away preference rights in such cavalier fashion. They must, we submit, have assumed that all rights granted by the 1912 Act were fully protected by the Veterans' Preference Act of 1944.

II

RESPONDENTS NEVER ACQUIRED COMPETITIVE STATUS AND WERE PROPERLY CLASSIFIED IN SUB-GROUP B–1 ON THE RETENTION REGISTER

Respondents contend that even if the Civil Service Commission "Retention Preference Regulations" are valid, they were, nevertheless, improperly separated. They argue that, contrary to the holdings of both courts below, they had acquired competitive status[19] on the completion

[19] Executive Order No. 9830 of February 24, 1947 (12 F. R. 1259, 3 CFR, Supp. 1947, 107) defined competitive status and competitive service as follows:

Part II—Civil Service Rules

* * * * * *

"§ 1.1 * * * As used in these Rules, the words 'competitive service' shall have the same meaning as the words 'classified service,' or 'classified (competitive) service,' or

of the probationary periods of their appointments,[20] and that, under the regulations, they should have been classified in sub-group A–1 on the retention register and have been retained in preference to all A–2 attorneys.[21]

'classified civil service' as defined in existing statutes and Executive orders. The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom under statute or Executive order, and all positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject thereto by statute. Whenever there is a doubt the Commission shall determine whether a position is in the competitive service.

"(b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. A competitive status shall mean a status which permits a person to be promoted, transferred, reassigned, and reinstated to positions in the competitive service without competitive examination, subject to the conditions prescribed by the Civil Service Rules and Regulations for such noncompetitive actions. A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or the Civil Service Rules."

[20] Respondents seem to attach independent significance to the fact that their appointments were probational for a year and that they successfully completed the probationary period. But all war-service attorney appointments were made "subject to the satisfactory completion of a trial period of one year." Board of Legal Examiners Regulations, § 17.1 (g) (8 F. R. 5208). Respondents' successful completion of that period did not confer competitive status on them, but, on the contrary, was a condition precedent to their continued employment for the period of the emergency.

[21] The only point urged by respondents in their petition in No. 474 was that the regulations were invalid. The contention that they had acquired competitive status, and their

The short answer to that contention is that the regulations in effect at the time of their appointments (Regulations of the Board of Legal Examiners, § 17.1 (g)) specifically prohibited the acquisition of competitive status by reason of such appointments and that their appointments

other contentions discussed in Part III below, are not properly before this Court in support of respondents' request that the judgment below be reversed. Since, however, all these points can be urged in support of the judgment against the Secretary, it is necessary that we answer them.

Respondents implied in their complaints (R. 53-54) that the reduction-in-force of which their separation was a part was not made in good faith, and that it was in reality a device for avoiding their veterans' preference. They have not raised that question here nor did they raise it in the court below. We should like, however, to call to the Court's attention the facts concerning this reduction-in-force:

It was part of a drastic retrenchment by the Office of the Solicitor, Department of Agriculture, during 1947, necessitated by lack of funds. In February, 1947, seventeen attorneys had been separated because the Office did not then have sufficient funds to meet the salary raises resulting from the Pay Act of 1946. Subsequently, in the 1948 Appropriation Bill the House of Representatives cut the Budget of the Solicitor's Office by $500,000. Separation notices were then sent to seventy-five attorneys, including respondents. The separations were to be effective at the end of the fiscal year, June 30, 1947, but in order to preserve as much of the 1948 appropriation as possible for 1948 operations the separated attorneys were placed on annual leave on June 6. Pending Senate action on the Bill the attorneys were continued on the rolls beyond June 30, in the hope that the Senate might restore the cut and the attorneys could be put back to work without prejudice to their employment status (R. 40). The Senate restored $100,000 of the cut and the separation notices were rescinded as to all but forty-three attorneys. As to them, the separations were made effective (R. 46). The total number

were, in fact, limited to "the duration of the war and six months thereafter" (R. 43).

Respondents, however, pursue a tortuous path through the history of the regulations of the Board of Legal Examiners, and, relying at each stage on a meticulously literal reading of isolated portions of the relevant documents, conclude that, despite the regulations and the terms of their appointments, they somehow acquired competitive status. We feel it appropriate, therefore, to set out at some length the evolution of the regulations in effect at the time of respondent's appointments.

A. 1. Prior to 1941 most attorney positions were filled without regard to Civil Service lists. In 1940, Congress, in the so-called Ramspeck Act (54 Stat. 1211, 5 U. S. C. § 631a) "authorized" the President "by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government." Pursuant to that authorization, the

---

of attorneys separated in 1947 were sixty. An additional thirty were downgraded. In addition, the Solicitor's Office was substantially reorganized; in the course of that reorganization, eight ranking Washington positions, two regional offices and seven side offices were abolished. Hearings before a Subcommittee of the Senate Appropriations Committee on the 1948 Department of Agriculture Appropriation Bill, 80th Cong., 1st Sess., pp. 108–110; Hearings before a Subcommittee of the House Appropriations Committee on the 1949 Department of Agriculture Appropriations Bill, 80th Cong., 2d Sess., pp. 252, 258–260.

President, by Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117, 3 CFR Cum. Supp. 927) *infra*, pp. 51–55, covered a number of positions, including most attorney positions, into the classified civil service.

By Section 3 of Executive Order 8743, there was "created in the Civil Service Commission * * * a board to be known as the Board of Legal Examiners" which was given the duty of promoting "the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service." The Board was charged with responsibility "in consultation with the Civil Service Commission" of determining regulations and procedures governing the employment of attorneys. The Civil Service Commission was directed to establish, in the manner determined by the Board, registers of eligibles from which attorney positions were to be filled. Subsection 3 (i) authorized, and prescribed procedures for, the filling of attorney positions vacant after June 30, 1941 "before available registers [were] established."

On June 27, 1941, the Board of Legal Examiners promulgated its first regulations as Part 17 of the Regulations of the Civil Service Commission (6 F. R. 3577). Section 17.1, "Appointments from existing registers," provided that pending establishment of registers under E. O. 8743, appointments to attorney positions could be made from existing registers of the Civil Service Com-

mission. Section 17.2, entitled "Appointments pending registers," provided that, with the prior approval of the Civil Service Commission, appointments to attorney positions could be made without regard to E. O. 8743, provided that persons so appointed would subsequently be required to pass the examinations to be prescribed by the Board. On August 6, 1941, Section 17.1 was revoked and Section 17.2 was amended (6 F. R. 4091). As amended, Section 17.2 was entitled "Procedure prior to the establishment of registers"; it provided that appointments without prior examination could be made only in "cases of special emergency" and that all other appointees must first have passed non-competitive examinations. It prescribed the type of examination to be given [22] and the minimum requirements for appointments in various grades.

2. After our entrance into World War II, the President, by Executive Order No. 9063, dated February 16, 1942, (7 F. R. 1075, 3 CFR Cum. Supp. 1091) (*infra*, pp. 55–56), authorized the Civil Service Commission to adopt and prescribe such special procedures as were felt necessary to govern recruitment in all positions in all departments and agencies, and provided that "Persons appointed solely by reason of [such] procedures * * * shall not thereby acquire a classified (competitive) civil-

[22] The examination consisted of two parts: (1) evaluation of qualifications, and (2) oral examination. In the cases of appointment to grades higher than P–5, the oral examination could be waived.

service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter."

On March 16, 1942, the Board of Legal Examiners amended Section 17.2 of its regulations to add subsection (g) which provided (7 F. R. 2201): "Effective March 16, 1942, all appointments to attorney and law-clerk trainee positions shall be for the duration of the present war and for six months thereafter unless otherwise specifically limited to a shorter period. *Such appointments shall be effected under E. O. 9063* * * *, and persons thus appointed will not thereby acquire a classified status * * *." (Italics added.) At the time subsection (g) was added, Section 17.2 was the only provision in the Board's regulations dealing with appointments to attorney positions.[23]

On January 30, 1943, the Board of Legal Examiners prescribed (Section 17.8; 8 F. R. 2141)[24] procedures governing the establishment of registers, and the Civil Service Commission established registers shortly thereafter. On April 20, 1943, the Board "revised and amended" its regulations (8 F. R. 5207). As amended, the regulations

[23] Section 17.1 "appointment from existing registers" had been revoked on August 6, 1941 (6 F. R. 4091). *Supra*, p. 31. Section 17.3 (6 F. R. 3579) recommended the establishment of law-clerk trainee positions. Section 17.4, 17.5, and 17.6 (6 F. R. 4181, 5799) dealt with transfers of attorneys.

[24] Section 17.7, added May 4, 1942 (7 F. R. 3853), dealt with transfers and promotions with increase in grade.

no longer contained any reference to "Procedure prior to the establishment of registers," for the obvious reason that registers had by then been established. The substance of what was formerly Section 17.2 (g) became subsection (g) of Section 17.1 ("Appointments") and read:

> All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942.

3. By Executive Order 9358, July 1, 1943 (8 F. R. 9175) "the administration of the civil service laws in their application to attorney positions" was vested in the Civil Service Commission. The Commission continued the regulations

of the Board of Legal Examiners in effect. Civil Service Acts, Rules and Regulations, Annotated (amended to October 31, 1943), p. 171. Respondents were not appointed to their positions until July 26, 1943 and August 1, 1943 (R. 3, 77).[25]

B. Tested against this history of the executive and administrative pronouncements bearing on the point, respondents' arguments that they acquired status are clearly untenable.

1. They first contend that Section 17.1 (g) of the Board's regulations (as revised and amended on April 20, 1943) (*supra*, p. 33) was intended to apply only to appointments "prior to the establishment of registers." They base their argument solely on the fact that the Board's war service regulation was originally promulgated on March 16, 1942 (7 F. R. 2201) as an additional subsection to Section 17.2 which at that time was entitled "Procedure prior to the establishment of registers." *Supra*, pp. 30–31. They explain its subsequent form, in Section 17.1 (g), on the theory that when the regulations were subsequently "republished * * * in a sort of connected code" (Elder Br., p. 56) the subtitle "Procedure prior to the establishment of registers" was unaccountably omitted.

We believe, however, that the regulation as originally promulgated in March 1942 plainly gov-

[25] Attorney positions were excepted from the competitive service effective May 1, 1947 (see *infra*, pp. 40–41).

erned "all appointments to attorney positions" after March 16, 1942, and its inclusion in the Section entitled "Procedure prior to the establishment of registers" is explained by the fact that, as noted above (p. 32), Section 17.2 was then the only section of the Board's regulations dealing with appointments. If there could be any doubt on that score, it was removed when the regulations were revised and amended in April 1943, and as amended omitted all reference to "Procedure prior to the establishment of registers." The omission was not, as respondents think, unaccountable, but was made for the obvious reason that registers had by that time been established. *Supra,* pp. 32–33. It verges on the frivolous to contend that Section 17.1 (g), the regulation of the Board of Legal Examiners in force at the time respondents were appointed, did not apply to their appointments.

2. Respondents secondly contend that only the Civil Service Commission, and not the Board of Legal Examiners, was authorized, under E. O. No. 9063 (February 16, 1942), to promulgate war service regulations and that the Board's regulations were therefore invalid. The answer is that, on the contrary, the Board's regulations were authorized by E. O. No. 9063, were issued after consultation with and with the approval of the Civil Service Commission, and were, in any case, ratified by a subsequent Executive order and

adopted by the Commission prior to respondents' appointments.[26]

The Board of Legal Examiners was created, by Executive Order No. 8743, "*in* the Civil Service Commission." Its regulations, determined in consultation with the Commission, were promulgated as Part 17 of the Commission's regulations. There is no evidence, and no reason for thinking any can be found, that the conditions motivating the President to authorize the Commission to promulgate special war service regulations were not present in the case of attorneys. Nor is there anything in E. O. No. 9063 which indicates that the Commission could not delegate part of its power to regulate all appointments during the emergency to the unit within the Commission set up to handle attorney appointments. That some such delegation was made seems evident from the fact that the Board's regulations specifically cite E. O. No. 9063 as authority: "Such appointments shall be effected under Executive Order No. 9063 * * * and persons thus appointed will not thereby acquire a classified status." Moreover, the Board's regulations coincided with those of the Civil Service Commis-

[26] We might also point out that even if the Board's regulations were invalid, it would not follow that respondents acquired competitive status. The proper result would appear to be that they were never properly appointed to the federal service at all.

sion governing appointment to other positions (7 F. R. 7725).

If further proof of the validity of the Board's war service regulations, as applied to respondents, is thought necessary, we believe it is supplied by two subsequent events: On August 20, 1942, Executive Order No. 8743 (creating the Board of Legal Examiners) was amended by Executive Order 9230 (7 F. R. 6665, 3 CFR Cum. Supp. 1201). As amended, subsection 3 (i) read in part: "Persons whose appointment was approved by the Board prior to March 16, 1942 * * * shall be eligible for a classified civil-servic status * * *. Effective March 16, 1942, all appointments to attorney and law clerk (trainee) positions shall be for the duration of the present war and for six months thereafter unless specifically limited to a shorter period." Regardless of the validity of the Board's regulations prior to E. O. No. 9230, there can be no question that after August 20, 1942, appointments to attorney positions could be only of the war service variety.

Finally, by Executive Order No. 9358 (8 F. R. 9175, 3 CFR, Supp. 1943, 30, July 1, 1943), the functions of the Board of Legal Examiners were vested in the Civil Service Commission. The Commission continued the Board's regulations in effect. Civil Service Acts, Rules and Regulations, Annotated (amended to October 31, 1943), p. 171. At the time of respondents' appoint-

ments, in July and August 1943, the Board's regulations were in every sense the regulations of the Civil Service Commission.

In summary, we submit that there is no substance to respondents' argument that they had acquired competitive status and were, consequently, improperly separated. The regulations in effect at the time of their appointments were valid and specifically prohibited the acquisition of status by such appointments. Nothing happened subsequent to their appointments which could confer such status on them. They were, therefore, without status at the time of their separation and were, under the Civil Service Commission "Retention Preference Regulations," properly classified in subgroup B–1 on the retention register.

III

RESPONDENTS' SEPARATION WAS IN ALL OTHER RESPECTS IN ACCORDANCE WITH LAW

Respondents make three other contentions which are, we believe, wholly without merit. They are dealt with briefly below.

1. Respondents contend that the separation notice of May 29, 1947, was in violation of Section 14 of the Veterans' Preference Act of 1944 (*infra*, pp. 44–45) in that it afforded them less than the full thirty days required by that statute. The notice was received by respondents on May 29, 1947, and informed them that they were to

be "separated, effective on or after June 30, 1947" (R. 44). Respondents' last day of active duty was to be June 6, 1947, and the notice further provided: "after your last day of active duty the remainder of the notice period will consist of your accrued annual leave and nonpay status thereafter" (R. 44). Respondents seek to construe the notice as notice of "furlough without pay," effective June 6, 1947.

It is difficult to understand how they propose to sustain that construction. Respondents were not furloughed without pay and it was never the intention of the Secretary to take such action. They were separated effective June 30, 1947, and the notice of separation was ample. After June 6, 1947, respondents continued on the rolls of their office and were apparently on annual leave (R. 46).[27]

Section 14 of the Veterans' Preference Act nowhere requires that persons about to be separated remain on active duty throughout the notice period. The Civil Service Commission Regulations require that an employee affected by a reduction-in-force be kept in active duty status for as much of the period as possible but expressly permit his being placed on annual leave for any part of the period, and, if his annual

[27] It has long been established that employees may be forced to take annual leave, without their consent, whenever such action is in the interest of the service. 19 Comp. Gen. 955, 28 Comp. Gen. 526.

leave is insufficient to cover the period, that he be carried on the rolls in a non-pay status. Civil Service Commission "Retention Preference Regulations," 5 C. F. R. (1949), Section 20.10. The requirements of those regulations were more than fulfilled in the case of respondents and their separations were upheld by the Commission (R. 62–63).

2. Respondents also contend that because attorney positions were excepted from the competitive service after May 1, 1947, it was impossible for any attorney to be classified in Group A on the retention register and, therefore, that the A–2 attorneys retained should have been classified in sub-group B–2 and separated before respondents. But the very regulations on which respondents rely (Section 20.3 of the "Retention Preference Regulations", 12 F. R. 2850) (see Elder Br. at p. 45) define Group A to include: "with respect to positions excepted from the Civil Service Act and rules * * * all employees currently serving under appointments without time limitation." So far as appears, the A–2 attorneys held appointments without time limitations and were properly classified on the retention register.

3. Respondents final contention is that "attorney positions have remained in the classified (competitive) civil service during all times since the issuance of Executive Order No. 8743 of

April 23, 1941." (Elder Br. at p. 45.) It is difficult to perceive to what purpose the argument is made. Even if respondents' hypothesis were true, they have never held an appointment making them eligible for classified status. In any case, the argument is not sound. The Ramspeck Act, 54 Stat. 1211, 5 U. S. C. § 631a (*supra*, p. 25), simply *authorized* the President to cover all positions in any agency into the classified service and that power was exercised, as to attorneys, by Executive Order No. 8743 (6 F. R. 2117). See page 30, *supra*. That Act did not impair the President's power, under R. S. 1753 (5 U. S. C. § 631), to "prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof."[28] Executive Order No. 9830, which excepted attorney positions from the competitive service (12 F. R. 1259, 1264), was entirely within the power of the President.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals for the District of Columbia Circuit was correct insofar as it upheld the validity of respondents' separation, and, for the reasons stated in our brief in

[28] That power was expressly continued in the President by the Civil Service Act of 1883, Section 7, 22 Stat. 406, 5 U. S. C. § 638.

No. 473, it is respectfully submitted that the judgment should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
MORTON LIFTIN,
ARTHUR W. MURPHY,
Attorneys.

APRIL 1951.

APPENDIX

1. Sections 12, 14 and 18 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390, 391, as amended by the Act of August 4, 1947, 61 Stat. 723, 5 U. S. C. and 5 U. S. C., Supp. III, §§ 861, 863 and 867) provide:

SECTION 12.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies,

for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SECTION 14.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a per-

sonal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SECTION 18.

All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

2. Section 4 of the Act of August 23, 1912 (37 Stat. 413, 5 U. S. C., 1934 ed., § 648) provides:

SEC. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept

in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also proxide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

3. Sections 17.1 and 17.6 of the Regulations of the Board of Legal Examiners (8 F. R. 5207, 5 C. F. R. Cum. Supp. § 17.1 and 17.6) provide:

§ 17.1 *Appointments.* (a) If a person whose appointment to an attorney position was authorized by the Board prior to March 16, 1942, subject to later noncompetitive examination, fails to pass the examination, his appointment shall terminate within 30 days after notification by the Board to the department or agency in which he is employed, except that in cases of special emergency he may be retained, without acquiring civil service

status, for such longer period as the Board, in its discretion, deems necessary. A person whose appointment was authorized prior to March 16, 1942 and who passes a non-competitive examination acquires a classified civil service status six months from the date of his appointment, if there has been compliance with the provisions of Section 2.6 of this chapter, other than those provisions relating to recommendation and examination.

(b) Except as provided in paragraph (g) of this section, no person may be appointed to an attorney position unless he has passed a non-competitive examination prescribed by the Board or has his name listed on an attorney register applicable to the position to which he is appointed. The non-competitive examination will be given only to a person whose proposed appointment has been submitted to the Board by an appointing officer.

(c) The following qualifications will be required:

(1) *For appointment to Grade CAF–4.* Graduation from a recognized law school as defined by the Commission, to wit, a law school authorized to confer the Bachelor or higher degree in law, which requires residence work. No person shall be eligible for appointment to this position who has failed a bar examination since his graduation from law school and who has not subsequently passed such an examination, or who has, except for good cause shown, failed to take a bar examination within one year of graduation from law school.

(2) *For appointment to Grade P–1 and higher.* Admission to the bar and the following professional experience or its

equivalent: P–1, none; P–2, one year; P–3, eighteen months; above P–3, three years. In judging the equivalent of professional experience, special qualifications may be taken into consideration.

(d) Non-competitive examinations shall be conducted by or under the supervision of examining committees of three members to be appointed by the Chairman of the Board or pursuant to his direction and such committees shall determine the eligibility or ineligibility of the candidate. The determination shall be based upon (1) the record and experience of the candidate and (2) an oral examination. The oral examination may be waived in the case of appointments above P–5 and in the case of any war service appointment, if the examining committee is satisfied, without regard thereto, that the candidate is eligible.

(e) The determination of the examining committee in non-competitive examinations shall be final, except that within fifteen days after notification of failure an unsuccessful candidate may petition the Board to review the determination. Such review is discretionary and will be granted only for good cause shown.

(f) Examinations shall be directed to determining whether the candidate possesses the competence requisite for the professional grade generally rather than for any particular position within the grade.

Notwithstanding the foregoing provision a person employed in a position other than an attorney position may be approved for an attorney position in the same agency in a grade not higher than P–3 provided (1) that he meets the minimum require-

ments prescribed in paragraph (c) of this section; (2) that his assignment will be limited to work which calls primarily for knowledge of the particular agency; (3) that his experience in the agency especially qualifies him for the type of work for which he is proposed; and (4) that the examining committee is satisfied of his ability to perform competently the type of work to which he will be assigned. Persons thus approved for particular positions shall be eligible to acquire qualified Civil Service status as attorneys. Persons who acquire or who are approved for qualified Civil Service status as attorneys may not be reassigned to a different type of work or transferred to another agency without first passing such competitive or non-competitive tests as the Board may prescribe. Promotion to any grade above P–3 shall *per se* be deemed reassignment for the purpose of this section.

(g) All appointments to attorney and law-clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in

other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942.

* * * * *

§ 17.6 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and of the supplements thereto shall constitute the certification of the eligibles included. The register, together with pertinent information concerning the eligibles which the Board will supply, shall be available in full to appointing officers, who may make selections for appointment from among those included, subject to the Board's stated minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add

to a register others who have qualified through examination, in substitution for those who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon register for cause arising either before or after his original certification. In case the life of a register is extended, the eligibles remaining upon it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

4. Executive Order No. 8743, April 23, 1941 (6 F. R. 2117, 3 C. F. R. Cum. Supp. 927) provides, in pertinent part:

> By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "Extending the Classified Executive Civil Service of the United States" (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows;
>
> SECTION 1. All offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of section 1 of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.
>
> * * * * *
>
> SECTION 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No. 118, 77th Congress) appointed by Executive

Order No. 8044 of January 31, 1939, it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to as the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and the Principal Legal Examiner of the Civil Service Commission, as members *ex officio*, and nine members to be appointed by the President, five of whom shall be chosen from the chief law officers of the Executive departments, agencies, or corporate instrumentalities of the Government, two from the law-teaching profession, and two from attorneys engaged in private practice. The President shall designate the chairman of the Board. Five members shall constitute a quorum, and the Board may transact business notwithstanding vacancies thereon. Members of the Board shall receive no salary as such, but shall be entitled to necessary expenses incurred in the performance of their duties hereunder.

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement,

appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys, in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided,* That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule VI shall be appropriately designated thereon.

(g) Any person whose name has been placed upon three registers of eligibles covering positions of the same grade, and who has not been appointed therefrom,

shall not thereafter be eligible for placement upon any subsequently established register covering positions of such grade.

(h) The eligibles on any register for attorney positions shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census, and the Commission shall certify to the appointing officer for each vacancy all the names on the appropriate register which meet the apportionment requirements: *Provided,* That whenever the Board shall be of the opinion that apportionment of eligibles on any register for attorney positions is not warranted by conditions of good administration, it shall so notify the Commission, which shall thereafter certify all the persons on such register to the appropriate appointing officer. The appointing officer shall make selections for any vacancy or vacancies in attorney positions from the register so certified, with sole reference to merit and fitness.

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointment of a person who has passed a noncompetitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for a classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided,* That the noncompetitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) The Commission with the approval of the Board shall appoint a competent person to act as Secretary to the Board; and the Commission shall furnish such further clerical, stenographic, and other assistants as may be necessary to carry out the provisions of this section.

(l) The Civil Service Rules are hereby amended to the extent necessary to give effect to the provisions of this section.

* * * * *

5. Executive Order No. 9063, February 16, 1942 (7 F. R. 1075, 3 C. F. R. Cum. Supp. 1091) provides:

Whereas millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and

Whereas it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons:

Now, therefore, by virtue of the authority vested in me by section 2 of the

Civil Service Act (22 Stat. 404), it is hereby ordered as follows:

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal establishment. The procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and Rules.

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 16, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1981